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Transnational Land Acquisitions (TLA): an evaluation of current legal frameworks and global regulatory responses from a human rights perspective

I. INTRODUCTION

Recent years have witnessed a rush by foreign governments and international investors to acquire farmland across the global South. According to data collected by Oxfam, 227 million hectares of agricultural land – an area nearly twice the size of South Africa – was negotiated for sale or lease between 2001 and 2011, mostly to international investors.[1] Although the land rush is a global phenomena, the World Bank estimates that seventy-five percent of the farmland under negotiation has been in Africa,[2] which will be the geographical focus of this paper. The acquisition of land by foreign actors in low-income countries does have antecedents in the colonial land transfers of the past, and the typical scenario of a 'finance rich, resource poor' state or state-backed investor acquiring land in a 'finance poor, resource rich' country still predominates. However, the new wave of land transfers involves a multiplicity of novel actors and a range of both short and long term driving factors that set it apart from the North-South imperialist tradition. What is often referred to as 'the global land rush' must be situated in 'an era of advanced capitalism, multiple global crises, and the role of new configurations of power and resistance in global governance institutions.[3] Trade and financial liberalisation since the 1980s has made it easier to invest abroad and brought a range of previously nationally or locally controlled economic resources – including land – into the supply chain of the global market. Inter-linked energy, climate, environmental and financial crises contributed to the unprecedented food price rises of 2007-2008, which stimulated further interest in agricultural land. However, research suggests that the long-term impact of these events has and will continue to be increasing commercial pressures on land, whose value to investors has soared alongside rising demand.

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[1] Oxfam 'Land and Power: The growing scandals surrounding the new wave of investments in land' (2011) 2.

[2] K Deininger & D Byerlee et al 'Rising global interest in farmland: Can it yield sustainable and equitable benefits?' (2011) The World Bank XIV.

[3] ME Margulis, N McKeon & S Borras Jr 'Land Grabbing and Global Governance: Critical Perspectives' (2013) 10:1 *Globlizations* 1.

Transnational land acquisitions (TLA) are promoted by international development agencies such as the World Bank as part of a 'win-win' process whereby profitable investment stimulates much needed agricultural and rural development in low-income countries.[4] However, there has been widespread opposition to TLA from international and national NGOs, UN agencies, rural peoples associations and other groups, who question the developmental benefits of TLA on a number of grounds, the most common of which is the threat they pose to food and tenure security.[5] Though exact numbers are not available, due in large part to the secrecy in which many land acquisitions are conducted, evidence suggests that many thousands (perhaps hundreds of thousands) of rural farmers and other land users have been dispossessed of their land (often without compensation) or otherwise had their human rights violated as a consequence of TLA.

The global land rush is a complex phenomena that cuts across the fields of development, international trade and investment, global governance, and international struggles for the protection and promotion of human rights. Scholars are beginning to shed light on these different aspects; in particular, the agro-economic impact of the global land rush has been widely discussed.[6] However, the legal and governance questions raised by TLA have received less attention. This paper responds to this knowledge gap by responding to the legal and governance (as opposed to the wider developmental) questions raised by TLA. It will show that the current international, regional and domestic legal frameworks that govern TLA provide excellent security for foreign investments in land but fail to adequately protect the human rights of the rural land users affected by those investments.

The legal frameworks that regulate TLA are also complex. They traverse national and international jurisdictional boundaries and are conceived, monitored and enforced by a plethora of institutions. Nevertheless, international trade and investment treaties that prioritise the security of capital over the human rights of affected

[4] World Bank op cit note 2.
[5] See Oxfam op cit note 1.
[6] For major mapping and analytical studies on the global land rush see J Franco et al 'The Global Land Grab: A primer' (Feb, 2013) Transnational Institute (TNI); A Ward et al 'Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project' (2012) International Land Coalition (ILC). For analysis of the agro-economic and developmental impacts of transnational land acquisitions see Lorenzo et al 'Land grab or development opportunity? Agricultural investment and international land deals in Africa' (2009) IIED/FAO/IFAD; International Assessment of Agricultural Knowledge, Science, and Technology for Development (IAASTD) 'Global Report: Agriculture at a Crossroads' McIntyre et al (eds) (2008).

communities have predominated over less enforceable human rights instruments, as well as over national laws in target states.

This paper will provide an outline of the multiplicity of legal frameworks that regulate TLA and evaluate the extent to which these frameworks are promoting and protecting human rights. The four major global regulatory and standard setting responses to TLA will then be delineated in order to assess whether they are capable of enhancing the legal protection of human rights for communities affected by TLA.

Chapter II will define TLA and map the history, scale, and human rights impact of the rush for land in Africa, including setting out the source and the content of the rights commonly being infringed. Case studies will highlight specific incidences of human rights violations resulting from TLA.

Chapter III will then consider the trade, investment and human rights frameworks – international, regional, and national – that comprise the current system of legal regulation for foreign investments in land. It will be shown that the legal regimes currently in place for TLA do not offer sufficient protection for the human rights of affected communities.

In Chapter IV the four major international responses to TLA, all of which have emerged in the past five years, will be reviewed from a human rights perspective. These are the minimum principles and measures to address the human rights challenge of large-scale land acquisitions promulgated by the United Nations Special Rapporteur on the right to food and endorsed by the Human Rights Council; the International Finance Corporation's inclusion of Land Acquisition and Involuntary Resettlement as a specific category of concern in its influential and recently updated Performance Standards; the Principles for Responsible Investment in Agriculture (PRAI) jointly developed by the World Bank, the Food and Agriculture Organisation of the United Nations, the United Nations Conference on Trade and Development, and the International Fund for Agricultural Development; and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security agreed between governments, civil society and international agencies and endorsed by the Food and Agriculture Organisation of the United Nations (FAO), the Committee on World Food Security, the G20 and the UN General Assembly.

The paper will conclude with an overall assessment of the extent to which the regulatory environment for TLA is now conducive to effectively promoting and protecting human rights, and what further measures can be taken to fulfil this end.

II. THE GLOBAL LAND RUSH: BACKGROUND AND DEFINITION, DRIVING FACTORS AND HUMAN RIGHTS IMPACTS

(a) Background

(i) *The scale of the global land rush*

The most comprehensive effort to document the scale of the global land rush to date is a combined civil society effort called 'The Land Matrix Global Observatory'.[7] The Matrix is a land monitoring initiative that collates information on TLA and publishes it online. It records land deals that are two-hundred hectares (ha) or more in size; include the transfer of rights to use and own land to a foreign investor; and which can be triangulated and cross-referenced for accuracy. Reliable and exact data on the scale of the global land rush is, however, inherently hard to establish. The authors of the Matrix cite a number of reasons for why this is the case.[8] Most importantly, the controversial nature of land deals means that they are often shrouded in secrecy. Negotiations tend to involve high-ranking officials and take place outside the public realm. Official data is often not recorded and decisions are not reported publicly. The entire process of a land deal can therefore be beyond the purview of the media or civil society, meaning that much of the data available on land deals comes from unofficial sources. Though all sources and data are checked for reliability, and a growing network of accredited monitors is in the process of being established, due to the geographical scale and distribution of TLA, many deals cannot be guaranteed, while many others may never come to the attention of the Matrix. These limitations, coupled with the limited research and awareness of TLA in most developing countries, leads

[7] The Land Matrix Global Observatory. International Land Coalition (ILC), Centre de Cooperation Internationale en Recherché Agronomique pour le Developpement (CIRAD), Centre for Development and Environment (CDE), German Institute of Global and Area Studies (GIGA) & Deutsche Gesellschaft fur Internationale Zusammenarbeit (GIZ) www.landmatrix.org.
[8] Ibid 'How reliable is the data?' www.landmatrix.org/about/.

the authors of the project to conclude that 'the aggregate figures are likely to be a significant underestimation of the scale of land deals.'[9]

With this in mind, the Land Matrix currently holds information about 944 land deals concluded since 2000, with a further 182 'intended' deals still under negotiation.[10] The total land area covered by these deals is 50 million ha, or more than three times the size of the Western Cape. All of these deals involve the transfer of land to international investors.

Oxfam has conducted one desk study that used a less stringent set of qualifying criteria for recording land deals, including relying heavily on information provided by media reports. It found that 227 million ha of land – an area nearly twice the size of South Africa – had been negotiated for sale or lease between 2001 and 2011, mostly to international investors.[11] The World Bank's 2011 study on the global land rush found that large-scale farmland acquisitions were becoming more common all over the world, particularly since the world food crisis of 2007-2008. It calculated that average annual expansion of global farmland was 4 million ha per annum before 2008, but this increased to 56 million ha in 2009 alone, with much of this increase due to TLA.[12]

(ii) *Focus on Africa*

The global land rush is affecting agrarian economies mainly in Africa and Asia. Forty-six percent of the concluded or intended deals recorded by the Land Matrix were in Africa, with thirty-six percent in Asia (the vast majority of which in South-East Asia), fourteen percent in South America, and the remaining four percent spread across the rest of the world.[13] The World Bank's 2011 study suggests that Africa accounts for an even higher proportion of TLA, with three-quarters of large-scale farmland deals recorded by the Bank in 2009 being in Africa. It also found that, of the estimated 446 million ha of globally noncultivated land suitable for farming that is not forested, protected or populated with more that twenty-five people per square kilometre, 201 million ha are in sub-Saharan Africa, which if cropped, would increase globally

[9] Ibid.
[10] All figures published on www.landmatrix.org, last checked 07 Feb 2014.
[11] Oxfam op cit note 1 at 2.
[12] World Bank op cit note 2 at XIV.
[13] Land Matrix 'By target region' www.landmatrix.org/get-the-detail/by-target-region/.

cropped land by a third.[14] Though the land rush is a phenomenon occurring across the global South, this paper will focus on Africa because this is where land deals are most prevalent and most likely to continue. Africa is also an appropriate focal area because African agriculture has on average the highest yield gaps as a result of historical underinvestment,[15] and has the most non-cropped arable land of any continent.[16] Investors are therefore looking to cash in on the continents great potential for agro-economic growth. Africa also provides an interesting case study because on no other continent is the smallholder agriculture affected by TLA more widespread; it has many of the weakest land governance regimes and states typically offer the least protection for land and other rights; and it is where the social costs of TLA have been greatest.[17]

(iii) *Defining transnational land acquisitions*

This paper uses the term 'transnational land acquisition', or TLA, to refer to *the purchase, lease, or gaining of a concession by an international investor to land in excess of two-hundred hectares in a foreign country.* Such acquisitions are often labelled as 'land grabbing' by their detractors. The 'Tirana Declaration' adopted by more than 150 civil society organisations defines land grabbing as acquisitions of land that are one or more of the following:

> (i) In violation of human rights, particularly the equal rights of women; (ii) not based on Free, Prior and Informed Consent of the affected land-users; (iii) not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered; (iv) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing, and; (v) not based on effective democratic planning, independent oversight and meaningful participation.[18]

This paper is concerned with how the current regulatory environment permits 'land grabbing' as described above to take place. However, not all land deals meet this description. To use the term 'land grabbing' to describe all land deals would therefore be misleading. In reality, the nature of each land deal varies considerably, from what

[14] World Bank op cit note 2 at XXXIV.
[15] Special Rapporteur on the Right to Food, Olivier De Schutter 'Report of the Special Rapporteur on the right to food' HRC Res 10/12 UN Doc A/HRC/13/33/Add.2 (28 Dec 2009) addendum, "Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge"' para 7.
[16] World Bank op cit note 2 at XXXI and XXXVII.
[17] See infra section *c* of this chapter.
[18] Tirana Declaration: Securing land access for the poor in times of intensified natural resources competition (2011) www.landcoalition.org/about-us/aom2011/tirana-declaration.

might be considered an illegal and secretive 'grab', to legally acquired leases that respect the human rights of local land users.

In the academic literature, the phrase 'large-scale land acquisitions' (LSLA) has also been widely used. However, LSLA includes acquisitions of land by domestic as well as foreign actors, whereas this paper is concerned with the legal regulation of transnational land acquisitions, which have their own unique characteristics.

According to the Land Matrix, seventy-seven percent of land acquisitions are for the purposes of agriculture, thirteen percent for forestry, and ten percent for the purposes of tourism, industry or conservation.[19] TLA includes acquisitions of land for all of these purposes. The acquisition of land for the purposes of natural resource extraction is a separate field of study, with its own dynamics, actors and regulatory frameworks, and is therefore not considered as TLA.

(iv) *Historical linkages*

The desire by foreigners to acquire and control land in Africa has a long history, and the links between today's wave of land acquisitions and Africa's colonial past have been discussed by a variety of scholars.[20] For the purposes of this paper, two features that distinguish today's land acquisitions in Africa from those of the past will be discussed. The present section will review the unique and expanded range of factors that are driving today's land rush forward, and the impact that these are having on the human rights of rural land users. Chapter III will then delineate the complexity of the contemporary legal frameworks under which TLA occur.

(b) Driving factors of the global land rush

A convergence of short and long-term events linked to various global crises are putting unprecedented commercial pressures on land, which is becoming an increasingly valuable resource to a range of investors.[21] It is possible, however, to

[19] Land Matrix 'Dynamics Overview' www.landmatrix.org/get-the-idea/dynamics-overview/.
[20] See NL Peluso & C Lund 'New frontiers of land control: Introduction' (2011) 38:4 *Journal of Peasant Studies* 667.
[21] For a comprehensive analysis of the factors driving the global land rush see Anseeuw et al 'Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project' (2012) ILC.

identify three overarching and interlinked factors that are driving the land rush forward. These are: food insecurity; ongoing energy, climate and environmental crises; and the increasing role played by foreign investment and markets in all aspects of development.

(i) *Food insecurity and the acquisition of land for agro-exports*

The Food and Agriculture Organisation of the United Nations (FAO) predicts that global food production will have to increase by seventy percent by 2050 if the world's growing, more urban and richer populations are to be adequately fed. It has consistently argued that today's world food system is not working because already over one billion people go hungry each day.[22] At the same time that many developing countries are struggling to feed their own populations, net food-importing countries such as China, India, South Korea and the Gulf and Middle Eastern states, who have growing populations and economies but limited arable land, are seeking new ways to guarantee their own food security. There are now many examples of governments and investors from these countries acquiring land overseas for such purposes, for example:

- Indian company Varun International has leased 465,000 ha of land in Madagascar to grow rice for consumption in India;
- South Korea has acquired 690,000 ha of land in Sudan to grow wheat for domestic consumption;
- The United Arab Emirates has invested in 400,000 ha of Sudanese land to grow a variety of crops for export back to the Gulf;
- Libya has leased 100,000 ha of land in Mali for rice production.[23]

Simultaneously, the expansion of the middle-classes in emerging economies such as the BRICS is creating demands for more luxurious diets that include more meat and exotic food products, which is increasing demand for grazing land, land for animal feed, and fertile land for other high-demand crops.[24] Incentives to acquire land abroad for the purposes of food security and rising middle-class consumer demand were

[22] FAO 'How to Feed the World in 2050' (2009). www.fao.org/fileadmin/templates/wsfs/docs/expert_paper/How_to_Feed_the_World_in_2050.pdf.
[23] Special Rapporteur on the Right to Food, Olivier De Schutter op cit note 15 at 6 n6-n8.
[24] See T Weis 'The Accelerating Biophysical Contradictions of Industrial Capitalist Agriculture' (2010) 10:3 *Journal of Agrarian Change* 315.

multiplied by the world food crisis of 2007-2008. The causes of the world food crisis have received much attention and include rising oil and other commodity prices, increasing demand for biofuels diverting existing food stocks, and the depreciation of the U.S. dollar linked to the financial crisis.[25] Though many of the factors driving the land rush are long-term, the food crisis was a turning point because it highlighted – especially for food-insecure countries – just how unstable and uncertain the current world food system is. As food prices reached record levels – rising over eighty percent in eighteen months[26] – many countries experienced food riots, some of which evolved into the 'Arab Spring' uprisings.[27] For the first time in decades, Russia, one of the world's major grain exporters, enacted export restrictions on a variety of crops. This event, and the 'beggar thy neighbour' policies that followed from other food-exporters, perhaps more than any other, dramatically illustrated to food-importing nations the need to have more control over their food supply. Since at least 2000, and in an accelerated fashion since 2007, many have been seeking to acquire land overseas in order to produce food directly for export, and are targeting countries, often in Africa, where production costs are lower, land governance weaker, and land and water more abundant than in their own territories.[28]

Information extracted from the Land Matrix shows that seventy-seven percent of TLA are for the purposes of agriculture. Of this, twenty-five percent are for the export of food crops, twenty-two percent for non-food crops (mainly biofuels), with the remaining fifty-three percent for flex-crops and mixtures of food and non-food crops.[29]

(ii) *Biofuels and the energy, climate and environmental crises*

Rising demand for oil amid uncertainty about on-coming 'peak oil' has lead many industrialised and emerging countries to look to biofuels as a key component of their

[25] D Headey & S Fan 'Anatomy of a crisis: the causes and consequences of surging food prices' (2008) 39 *Agricultural Economics* 375.
[26] K Wellard Dyer 'Large-scale land deals, food security and local livelihoods' (2013) Future Agricultures Consortium, CAADP Policy Brief 10.
[27] R Bush 'Food riots: poverty, power and protest' (2010) 10 *Journal of Agrarian Change* 119.
[28] J von Braun & R Meinzen-Dick '"Land Grabbing" by Foreign Investors in Developing Countries: Risks and Opportunities' (13 April 2009) IFPRI Policy Brief 13, 1.
[29] Land Matrix op cit note 7.

future energy needs.[30] The acquisition of land for the purposes of biofuels production is seen as one way of ensuring an affordable and reliable supply of energy that decreases reliance on volatile oil markets and can thus help oil-importing countries to achieve energy security.

Industrialised nations are also investing in biofuels as a means of achieving the CO^2 emissions reductions required to limit climate change.[31] Europe and the United States have been at the forefront of such efforts and have both recently passed legislation committing themselves to large increases in biofuels production for this purpose.[32] Vast tracts of land are required to grow the amount of biofuels expected by this legislation, which has led American and European agro-businesses to look for cheap, uncropped land overseas.[33] As a result of this trend, some estimates have put the area of land acquired for biofuel production at twice that acquired purely for food crops.[34]

Global environmental decline, linked to both climate change and the exploitation of the environment for commercial ends, is also making healthy and arable farmland more valuable and increasing competition for land both domestically and internationally. Countries facing the worst impacts of environmental decline, such as China, are looking to acquire arable land overseas because the quality of their own soils and the availability of clean water is diminishing. These aspects of the search for land overseas are closely tied to the availability of fresh water supplies, which are also on the wane in many parts of the world.[35] As demand for food continues to rise and agricultural production attempts to keep apace, interest in arable land with access to abundant fresh water is set to continue to grow exponentially.[36]

A final environmental factor driving the land rush is the phenomenon of 'green grabbing', which has been described as 'the appropriation of land and resources for

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[30] See Friends of the Earth 'Africa: Up For Grabs: The Scale And Impact of Land-Grabbing for Agrofuels' (2010) www.foeeurope.org/agrofuels/FoEE_Africa_up_for_grabs_2010.pdf.
[31] For criticism of the potential for biofuels to have a significant impact on global CO^2 emissions see B White & A Dasgupta 'Agrofuels capitalism: a view from political economy' (2010) 37:4 *Journal of Peasant Studies* 593.
[32] See the American Clean Energy and Security Act of 2009 (ACES) and the European Union's Renewable Energy Directive of 2009 (Directive 2009/28/EC).
[33] For a critique of EU biofuel policy see Franco et al 'Assumptions in the European Union Biofuel's Policy: Frictions with Experiences in Germany, Brazil and Mozambique' (2010) 37:4 *Journal of Peasant Studies* 661.
[34] Anseeuw et al op cit note 21 at 24.
[35] See S Kay & J Franco 'The Global Water Grab: A Primer' (Mar, 2012) Transnational Institute (TNI).
[36] Von Braun & Meinzen-Dick op cit note 28 at 1.

environmental ends'.[37] Green grabbing can be seen as one of the consequences of initiatives such as the UN backed carbon trading and sequestration schemes for industrialised countries, which provide incentives for acquiring land overseas for conservation and biochar production.[38] Such schemes are expected to play an increasing role in the North's efforts to combat rising CO^2 emissions because it allows governments to play a part in reducing global CO^2 without having to take the politically harder decisions that involve reducing consumer and business demand for energy at home.[39]

(iii) *Global economic liberalisation*

The increasing mobility and role of capital in development has put additional commercial pressures on land by making it more available to foreign acquisition. The global financial and trade liberalisation that has proceeded since the 1980s has accelerated economic globalisation and – particularly after the financial crisis and global recession of 2008 – stimulated a global drive for new, profitable sources of investment. The structural adjustment programmes promoted and enforced by international financial institutions such as the World Bank have made it easier for foreigners to invest in developing countries, including through TLA. As well as increasing access for productive investment, hedge and other investment funds have also been able to take advantage of the liberalisation of foreign land markets by acquiring land for the purposes of speculation.[40] The World Bank has also placed great emphasis on increasing foreign investment in agriculture as a means of stimulating a sector that has remained stagnant in Africa for many years.[41] Moreover, many African countries are in much need of export income and foreign currency to pay for debts and imports, and have been willing to sell or lease their land in order to get it.[42] As a result, law reforms have been adopted across the continent in order to attract foreign investment. These include offering tax incentives and removing or easing entry

[37] J Fairhead et al 'Green Grabbing: a new appropriation of nature?' (2012) 39:2 *Journal of Peasant Studies* 237.
[38] Ibid at 238.
[39] Franco et al 'The Global Land Grab: A primer' (Feb, 2013) Transnational Institute (TNI) 14.
[40] Special Rapporteur on the Right to Food, Olivier De Schutter op cit note 15 at para 2.
[41] World Bank op cit note 2 at XXXV.
[42] S Sassen 'Land grabs today: feeding the disassembling of national territory' (2013) 10:1 *Globalizations* 4.

requirements, including on social, labour and environmental standards.[43] Long-term investor friendly liberalisation and rising demand for land have made it easier and more attractive than ever to acquire land overseas.

(c) Impacts of TLA on rural land users

The benefits and burdens of TLA are often not evenly shared between investors, host governments, and the rural land users directly affected by land deals. International human rights law and many host country constitutions accord rural land users a number of rights that are being infringed as a result of TLA. The primary duty bearer under international human rights law is the state. The intricacies and formalities of international human rights law, and the obligations of non-state actors will be discussed in Chapter III. In this section the source and content of the rights impacted by TLA will be outlined and evidence from two case studies in Africa used to highlight the nature of these impacts. Though it is now generally recognised that all human rights are interlinked and interdependent, I will focus on the rights to land, housing, food, to a sustainable livelihood and environment, and cultural rights, as these are the human rights most affected by TLA. I will also consider the unique impact of TLA on women's human rights.

(i) *The rights to land and housing*

The right to own and use land is closely associated with the right to own property, which is considered one of the most fundamental human rights and is near universally accepted. It appears in article 17 of the Universal Declaration of Human Rights (UDHR) and is enshrined in many international and regional treaties and national constitutions. The right includes access to and ownership of land. At a minimum, it places an immediate obligation on states to provide and recognise legal title to land and guarantee security of tenure to all rural land users under its jurisdiction. The most explicit and detailed recognition of the right to land in relation to rural land users can be found in the 2007 United Nations Declaration on the Rights of Indigenous

[43] Polack et al 'Accountability in Africa's land rush: what role for legal empowerment?' (2013) IIED/IDRC 23.

Populations (henceforth the Indigenous Peoples Declaration).[44] It includes rights against forced removal from land and to redress if such removal occurs,[45] and the requirement that no relocation takes place without the free, prior and informed consent (FPIC) of affected communities, who must receive just and fair compensation if relocation is agreed.[46]

The right to land is also closely linked to the right to adequate housing, because without legal recognition of collective or individual land rights, the right to housing cannot be effectively realised.[47] In international human rights law, everyone has the right to adequate housing.[48] It is a component of the right to an adequate standard of living and includes, inter alia, 'the right to protection against arbitrary or unlawful interference with privacy, family, home, and to legal security of tenure.'[49] The Special Rapporteur on the right to adequate housing has expressed that all states have an 'immediate obligation' to guarantee security of tenure to anyone currently lacking titles to home or land.[50] The rights to property, land and housing also include provisions against forced eviction and displacement. According to the Special Rapporteur, 'forced evictions constitute prima facie violations of a wide range of internationally recognized human rights and can only be carried out under exceptional circumstances and in full accordance with international human rights law'.[51] Provision of compensation, restitution, and adequate rehabilitation must be provided in the event that any displacement occurs, which itself can only take place in 'exceptional circumstances' and with full legal justification.[52]

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[44] United Nations Declaration on the Rights of Indigenous Populations (13 Sep 2007) UN Doc A/Res/61/295. There is no universally agreed definition for the term 'indigenous peoples', however rural land users in Africa meet several of the criteria established by ILO Convention No. 169 on Indigenous and Tribal Peoples (1989), which includes anyone descending from populations who inhabited a geographical region that was subsequently colonised, have their status wholly or partially governed by their own customs, have a special relationship with their land, and who identify themselves as indigenous peoples.

[45] Ibid at art 28.

[46] Ibid at art 10.

[47] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari (5 Feb 2007) UN Doc A/HRC/4/18 at para 29.

[48] See the International Covenant on Economic, Social and Cultural Rights art 11(1); the Convention on the Rights of the Child art. 27, para. 3; as well as the non-discrimination provisions found in article 14, para 2 (h) of the Convention on the Elimination of All Forms of Discrimination against Women, and article 5 (e) of the International Convention on the Elimination of All Forms of Racial Discrimination.

[49] Report of the Special Rapporteur on adequate housing op cit note 47 at para 13.

[50] Ibid at paras 23, 25.

[51] Ibid at para 21.

[52] Ibid at paras 42, 60-63, 21.

Case study of land and housing rights violations in Zambia[53]

In 2010, 222 Zambian families were displaced from their land without compensation in order to make way for a transnational land acquisition. The land had been owned by a missionary church since 1906 but the title deeds allowed 'native' people to live and work on the land without disturbance, and could not be removed without the consent of the church administrator. When an outside investor, PrivaServe Foundation, expressed interest in acquiring the land for commercial purposes, the church entered into secret negotiations and announced plans to evict what it had now decided to call 'illegal settlers'. The affected families formed a committee to contest their eviction and put together US$320 to hire a representative (they couldn't afford a lawyer) who could put their case to the district High Court. The local Chief was in favour of the deal and informed the representative that his Presidential contacts would ensure the court allowed the deal to proceed. The representative then abandoned the case and was not present when the court ruled in favour of the church and the investor. The families vacated their homes and ancestral land and received no form of compensation because the court agreed that they were occupying the land illegally. Among the many impacts this had on the families were: the loss of their farm land, grazing land, and therefore a large portion of their livelihoods; loss of their homes which they have had to re-build from scratch; the area they moved to is further away from hospitals and schools; overall increased poverty and food insecurity; and divided communities.

The situation these rural land users found themselves in is not an isolated case in Zambia, or in other parts of Africa. The case study highlights the ease with which rural land users rights to land and housing can be ignored in order to make way for a transnational land acquisition, and the severity of the impacts that can follow.

(ii) *The right to adequate food, to a sustainable livelihood and environment, and cultural rights impacted by TLA*

The human right to adequate food is recognised in several core human rights treaties[54] as well as in the constitutions of seven African states.[55] Its most explicit recognition in

[53] This case study is based on evidence and analysis in JT Milimo et al 'Social impacts of land commercialization in Zambia: A case study of Macha mission land in Choma district' (2011) ILC.
[54] See the Universal Declaration of Human Rights (UDHR) (10 Dec 1948) UN Doc A/810, art 25(1); the International Covenant on Civil and Political Rights (ICCPR) (16 Dec 1966) 999 UNTS 171, art 6;

international human rights law is in article 11(1) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which provides that States Parties must 'recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food'.[56] The Committee on Economic, Social, and Cultural Rights (CESCR) has elaborated on article 11(1) as requiring that everyone under the States Parties jurisdiction should have access to minimum essential food and nutrition.[57] Drawing on the CESCR, the Special Rapporteur on the right to food has concluded further that the state must respect, protect and fulfil this right by refraining from infringing the ability of individuals or groups from feeding themselves, preventing others (including private actors) from encroaching on that ability, and to take measures to actively increase the food security of all individuals and groups under its care.[58] In practice, the right to food has been associated with the rights to dignity, social security, and the right to life.[59] The Special Rapporteur has also noted some of the human rights challenges that TLA presents rural land users from a food security perspective. He has stated that

> The human right to food would be violated if people depending on land for their livelihoods, including pastoralists, were cut off from access to land, without suitable alternatives; if local incomes were insufficient to compensate for the price effects resulting from the shift towards the production of food for exports; or if the revenues of local smallholders were to fall following the arrival on domestic markets of cheaply priced food, produced on the more competitive large-scale plantations developed thanks to the arrival of the investor.[60]

As the Special Rapporteur makes clear, the rights to food and land are closely linked to the rights to a sustainable livelihood and environment. The notion of sustainability requires that development related activities such as TLA 'meet the needs of the present

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the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (18 Dec 1979) 1249 UNTS 513, art 12; and the Convention on the Rights of the Child (CRC) (20 Nov 1989) 1577 UNTS 3, arts 24(2), 27.

[55] H Simone 'Human Rights Mechanisms to Safeguard the Food/Land Rights of People Facing Land Use Shifts' in 'International instruments influencing the rights of people facing investments in agricultural land' (2011) ILC 1-30, 9. These are: the DRC, Ethiopia, Malawi, Namibia, Nigeria, South Africa, and Uganda.

[56] ICESCR (16 Dec 1966) 993 UNTS 3, art 11(1).

[57] CESCR (1999) General Comment No. 12 on the right to adequate food (art. 11), para. 14.

[58] Special Rapporteur on the Right to Food, Olivier De Schutter op cit note 15 at para 3.

[59] See Supreme Court of India *People's Union For Civil Liberties v Union of India and Others* 28 Nov 2001 No. 196/2001.

[60] Special Rapporteur on the Right to Food, Olivier De Schutter op cit note 15 at para 4.

without compromising the ability of future generations to meet their own needs.'[61] The right to a sustainable livelihood can be derived from a number of other human rights, most significantly, from the right to an adequate standard of living enshrined in article 11(1) of the ICESCR.[62] It is associated with the right to land because seventy-five percent of the world's poor live in rural areas and are dependent on farmland for their sustenance and livelihoods.[63] Displacement or denial of access to land has negative impacts on the livelihoods of present generations, as well as on future generations ability to enjoy their own secure livelihoods.

The right to a sustainable environment is enshrined in article 24 of the African Charter on Human and Peoples Rights[64] and article 29(1) of the Indigenous Peoples Declaration, and is at the centre of the 1993 Rio Declaration on Environment and Development. It is impacted in a number of ways by TLA, such as when the genetic resources of local land are undermined by monocultures and the use of pesticides; when forests are cleared to make way for TLA; and when water is taken away from local communities in order to irrigate acquired land.[65] There are many examples of TLA contracts which require that 'all the lease's irrigation needs be met before any others are taken care of.'[66] In the Niger Delta, TLA have diverted thirty percent of the water that flows to the wetlands populated by 1.4 million people, exacerbating the effects of recent draughts and contributing to mass migration from the area.[67]

Cultural rights, enshrined in article 1 of the ICESCR, article 22 of the African Charter, and throughout the Indigenous Peoples Declaration, are also impacted by TLA when ways of living are disturbed. Land taken away often has many nonmaterial values for rural people, playing a role, for example, in religious and cultural belief systems.[68] TLA are also creating new or exacerbating latent historical, ethnic or political conflicts over access to and control over land. Communities are not homogenous entities and individuals and families have differing levels of relative

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[61] World Commission on Environment and Development (Brundtland) Report (1987).
[62] See C Moser & A Norton *To Claim our Rights: livelihood security, human rights and sustainable development* (2001) London: Overseas Development Institute at 20, Table 2, for a matrix of the source and content of the human rights associated with the right to a sustainable livelihood.
[63] World Bank op cit note 2 at XIII.
[64] (Nairobi, 27 June 1981) 21 ILM 59.
[65] J von Braun & R Meinzen-Dick op cit note 28 at 3.
[66] RRI 'Turning Point: What future for forest peoples and resources in the emerging world order?' (2012) 20.
[67] Ibid.
[68] Margulis et al op cit note 3 at 14.

power, wealth, and land requirements, and are therefore likely to be divided in their response to foreign interest in their land. Some may stand to benefit while others fear they will be marginalised; some may be thrown off their land while others are given contracts with the investor on the project; some may be willing to sell their land, others may not. For example, in Ghana, a TLA led to a renewal of conflict between local farmers and their traditional council, who they suspected had profited from giving away their land in the past.[69] In Senegal, a rural meeting organised by a local council about a proposed TLA resulted in a 23 for, 21 against vote.[70] In many cases, protests against TLA have also resulted in violence being meted out against villagers. This has been reported in Ghana, Ethiopia, Senegal, Sierra Leone and Mali.[71]

Case study highlighting the impact of TLA on food security, livelihoods, environmental, and cultural rights in Sierra Leone[72]

It is estimated that more than a fifth of Sierra Leone's arable land has been leased – mostly to foreign companies – since 2009. The majority of the acquired land is used for growing oil palm, sugarcane and rice for export. Sierra Leone emerged from civil war only a decade ago and still ranks near the bottom of the United Nation's Human Development Index, with already high levels of food insecurity and fragile governance. The majority of the population are small-scale farmers dependent on land and rain-fed agriculture for their sustenance, livelihoods and well-being.

A study commissioned by Action for Large-scale Land Acquisition Transparency (ALLAT) looked at the social and economic impact of three TLA:

- Addax Bioenergy Ltd, which acquired 44,000 ha of land to export sugarcane;
- Sierra Leone Agriculture Ltd, which acquired 42,000 ha of land to export oil palm;
- Socfin Agricultural Company Ltd, which acquired 6,500 ha of land to export oil palm.

[69] Polack et al op cit note 43 at 31.
[70] Ibid at 32.
[71] Ibid at 43.
[72] This case study is based on evidence and analysis in J Baxter 'Who is benefitting? The social and economic impact of three large-scale land investments in Sierra Leone: a cost-benefit analysis' (July, 2013) ALLAT.

Small farms are extremely diverse in Sierra Leone in terms of both the crops they produce and the types of land used for production. Most smallholders depend on this diversity for their nutrition and for food security in case of the failure of one or more crops. However, the study found that the three components of the farming system that smallholders rely on most – upland farms, fallow bush, and tree-crop plantations – are those being targeted and cleared by foreign investors in order to make way for industrial monoculture plantations. The resulting decrease and denial of access to a full range of crops has had negative impacts on food and nutritional security. The study found 'increased levels of poverty, poorer and fewer meals eaten each day … [and] cultural dislocation and a breakdown of traditional social structures, such as male, female, mixed and youth farming and savings groups that contributed to social cohesion and community welfare.' The study concluded that many of the affected communities were now 'struggling to purchase food or even going without the food they once produced for themselves' as a result of the loss of the lands to foreign investors.

(iii) *Women's human rights*

Though women are responsible for the majority of agricultural production in Africa, they face 'systemic gender discrimination in terms of their access to, ownership of and control of land and the income that arises from its productive use.'[73] Women's human rights tend to be negatively impacted even more than their male counterparts because of the systemic discrimination they already face; their relative poverty; and their relative lack of power in public fora.[74] Women can face 'double' and 'triple' discriminations as a result of their subordinate status in traditional society. For example, women are less likely to have legal tenure over land, which is usually held by men. Women are also typically under-represented in traditional justice institutions. This double discrimination makes it harder for women both to dispute land claims, and to claim compensation and redress for grievances related to land.[75] Where gender-progressive laws and regulations have been put in place in some African countries,

[73] E Daley 'Gendered Impacts of Commercial Pressures on Land' (2011) ILC 5.
[74] Polack et al op cit note 43 at 23.
[75] Ibid at 22.

protection of women's rights, particularly in rural areas, remains 'constrained by entrenched cultural practices, lack of legal awareness, limited access to courts, and lack of resources.'[76] Dispossession resulting from TLA has often been a violent process, with women suffering most, including being raped, murdered and tortured in order to force compliance with eviction notices.[77]

Though the exact scale of the global land rush is hard to determine, it is now clear that transnational land acquisitions are on the rise and that large swathes of African land have been transferred to foreign investors over the past decade, as noted above. TLA are having many negative impacts on rural land users, including threatening food and livelihood security, and increasing poverty through forced displacement without adequate compensation or means of redress. One of the reasons this is happening is that the complex array of legal frameworks under which TLA take place are not providing adequate protection for the human rights of rural land users, a subject to which this thesis now turns.

III. OUTLINE AND ANALYSIS OF THE LEGAL COMPLEXITY OF THE GLOBAL GOVERNANCE FRAMEWORKS REGULATING TRANSNATIONAL LAND ACQUISITIONS: A HUMAN RIGHTS PERSPECTIVE

Unequal power relations between rural land users, host governments, and international investors are causing the benefits and burdens incurred in a transnational land acquisition to be unevenly shared. The overarching factor that both encapsulates and entrenches the unlevel playing field between communities, host governments and international investors, is the complex arrangement of international, regional, and domestic legal frameworks under which TLA take place. Foreign investment in land can be viewed as an aspect of contemporary globalisation that has proceeded without effective global governance, particularly in terms of human rights protections for those

[76] Ibid at 23.
[77] Daley op cit note 74 at 19.

affected by land deals.[78] Global governance refers to 'the modern practice of governing transborder problems and to the institutions, rules, actors, and ideologies that govern the global political economy'.[79] It involves attempts to find multi-lateral regulatory solutions to problems that are beyond the capacity of any single actor to manage alone. The overall regulatory environment for TLA is both fractured and incomplete, and the actors that influence and are involved in this regulation are many. In their analysis of 'land grabbing and global governance', Margulis et al identified three political tendencies to governing TLA: (i) those that seek to regulate to facilitate land deals; (ii) those that advocate regulation that mitigates the negative impacts of TLA while maximising opportunities; and (iii) those that want to regulate to prohibit and rollback TLA.[80] The first tendency is exemplified in the legal frameworks for trade, investment, and finance that are promulgated and enforced by actors such as the World Trade Organisation, international arbiters of finance and investment, transnational business lobbies, private actors that self-regulate transnational financial transactions and economic flows, and regional actors and host governments that seek to facilitate or attract foreign investment in farmland. The second tendency includes multi-lateral and hybrid initiatives to regulate TLA, involving International Finance Institutions, United Nations agencies, governments, as well as international and regional human rights responses to TLA. Corporate Social Responsibility (CSR) and Company Commitment Mechanisms (CCM) that investors can sign up to and which aim to prevent negative human rights impacts arising from transnational business activities also fall into this category.

The third category encompasses efforts mainly by transnational and local NGOs and rural social movements that are opposed to TLA taking place at all. These organisations have thus far tended to involve themselves in non-legal strategies such as advocacy, research, campaigning, monitoring and reporting on the human rights and other impacts of TLA. This third approach – based upon the prohibition or rolling-back of land deals – has thus far failed to influence the current or emerging legal frameworks for TLA.

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[78] TLA would fall into the category of contemporary global processes that Chanda and others have called 'globalization without governance', see Chanda 'Runaway Globalization Without Governance' (2008) 14 *Global Governance* 119.
[79] Op cit note 69 at 4.
[80] Ibid at 10.

The first two approaches apply to the bulk of the legal regulation applicable to TLA. What should be kept in mind, however, is that although there are multiple layers of global governance that affect TLA, foreign investment in land is for the most part governed by international trade and investment treaties and local domestic law, both of which tend to prioritise industrial and investment interests over human rights protections. The overall way in which international investment and land governance has evolved in recent decades has facilitated – but been slow to respond to – the extensive revalorizations of land taking place. The legal frameworks put power into the hands of investors, eschew the rights of rural land users, and help to put cash-strapped and incapacitated governments on the side of investors more so than their people. To make matters worse, the human rights approaches and instruments relevant to TLA are largely inaccessible, non-functioning, and unenforceable.

This chapter will evaluate the shortcomings of the global, regional and domestic governance of TLA from a human rights perspective. First, the international trade and investment legal frameworks will be considered, followed by an analysis of the voluntary regulatory initiatives applicable to foreign investors in agriculture. The domestic governance of TLA will then be considered, before the potential of international and regional human rights law to respond to the human rights challenges of TLA is evaluated. Chapter IV will then evaluate the four main international regulatory responses to the legal complexity and human rights impacts of TLA.

(a) International trade and investment law

(i) *International trade law*

The purpose of international trade and investment law is to promote, protect and facilitate predictable flows of transnational investment and trade. Following on from the General Agreement on Tariffs and Trade (GATT), the World Trade Organisation (WTO) is now responsible for most international trade (and some investment) law, which is negotiated between 159 member states and is fully legally binding and enforceable. Disagreements over trade and trade policy are arbitrated by the WTO dispute settlement mechanism (though most are settled ‘out of court’) and countries found to be flouting the rules can receive serious penalties, including economic sanctions, the removal of trade preferences, the payment of compensation, or

expulsion from the organisation.[81] The concerns of poorer nations have long been neglected at the WTO. As a member driven organisation, more powerful countries are in a stronger position to negotiate agreements, which is exemplified in the long-term trend to reduce barriers to trade in products where industrialised countries have a comparative advantage, while little has been done to reduce European and American agricultural subsidies that undermine developing countries comparative advantage in agriculture. More financially powerful countries are also better placed to settle disputes, which has a deterrent effect on challenges from poorer countries. Despite these asymmetries, the 'most-favoured nation' principle that guides all WTO rules ensures that all countries benefit from all tariff reductions and other trade facilitating deals agreed between member states: each member of the WTO must be the most-favoured nation in terms of trade preferences, which helps to reduce trade discrimination and generally makes it better for a country (rich or poor) to be a part of the club than to try to trade outside it. The second main principle of the WTO is the 'single undertaking', which provides that in order to become a member of the WTO a country must commit to implement the full range of WTO rules and agreements: it cannot 'pick and choose' those which it likes best. The majority of African states are thus bound by the full range of WTO treaties, while some qualify for varying degrees of trade flexibility, such as extended periods for the implementation of WTO commitments, due to their low-income status. In total forty-four African countries are full members of the WTO, six have observer status, and three are neither members nor observers.[82]

The first attempt to include the concerns of human rights and environmental groups in international trade law came in the 'coherence principle' adopted at the 1994 Marrakesh Agreement that established the WTO. The coherence principle requires international trade law to be coherent with environmental sustainability and international human rights law. In practice, however, this is rarely the case.[83] The main reason for this is that in-depth assessments of trade impacts on human rights and the environment are not compulsory for either trading partner, and when carried out, are done so inadequately or as an exercise designed to 'rubber stamp' an already agreed

[81] WTO 'Settling Disputes' www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.
[82] WTO 'Members and Observers' www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.
[83] EB Bonanomi 'Trade law and responsible investment' in 'International instruments influencing the rights of people facing investments in agricultural land' (2011) ILC 75.

trade deal.[84] In general, liberal reforms to trade and investment have been instituted in developing countries before appropriate domestic safeguard policies, such as macro-economic plans to absorb labour threatened by shifts in trade, have been put in place.[85] This is true of the 1995 WTO Agreement on Agriculture (AoA), which is the main international legal framework for trade in agricultural goods. The AoA requires countries to liberalise their agricultural sectors as a means, inter alia, to increase trade in agricultural commodities. The AoA is not, however, a human rights document. For example, the AoA does not include measures to ensure that increased food exports by a low-income country do not threaten domestic food security.[86] The AoA also has no requirement for trade and investment in agricultural assets to follow transparent and inclusive negotiation procedures.

The second attempt at incorporating human rights into international trade law was instituted in 2001 in what was called the 'Doha Development Round' of trade talks. High on the agenda at Doha were improvements in the AoA for developing countries. However, differences in opinion between developed and developing countries on how to strike a better balance between trade, the environment, human rights and other development issues has meant that, thirteen years on, the round has yet to be concluded. The failure of states to reach a conclusion at Doha has led to a surge in bi-lateral and regional trade agreements, which swing the balance of power further away from low-income countries, because they are now outside the formal equality of the WTO. This means that they are dealing directly with trade partners, such as the European Union, the United States or China, who represent many of the world's major international investors, and who can use their influence to dictate trade and investment terms in their favour.

The overall 'institutional bias' of the WTO means that promotion of trade and the protection of investments, capital and business property is central to all of its rules and agreements. The marginalisation of rural land users in the grand schema of transnational trade means that their concerns are largely absent from WTO agreements. Thus, while protection of investor property receives much attention in WTO agreements, there is no similar legal framework to protect rural land rights. In general, international trade law imposes few obligations on private investors, while

[84] Ibid at 74.
[85] Ibid at 72.
[86] Ibid.

encouraging member states to adopt policies aimed at facilitating and encouraging trade and investment irrespective of the human rights impact that these policies might produce.

(ii) *International investment law*

An open trade policy can have a significant impact on inward investment flows. Likewise, an unsustainable trade regime that eschews human rights considerations will promote an irresponsible investment climate.[87] Like trade law, international investment law has an institutional and ideological bias towards the investor. It exists to facilitate and protect transnational investments against the risks related to arbitrary and unjustifiable action by the host state, and takes the form of binding agreements in order to counter host government's ultimate and permanent sovereignty over its natural resources.[88]

International Investment Agreements (IIA) provide the main legal framework for the regulation of transnational investments. They usually require governments to treat investment in a 'fair and equitable' manner, which excludes discrimination in preference of local business and requires compensation for direct or indirect expropriation of assets.[89] Investment contracts determine whether, in the event of a dispute, international investment arbiters such as the International Centre for the Settlement of Investment Disputes or domestic mechanisms are responsible for resolution. The former is usually the case, which means that investment contracts and international investment law can overrule the national laws of host states.[90] Disputes brought to international arbiters can result in legally binding decisions imposed through international enforcement mechanisms.[91] This acts as an effective deterrent against 'unfair' behaviour by the state towards investors. Moreover, in an era where increasing foreign direct investment has been almost universally incorporated into low-income countries development strategies, governments do not want to be seen to

[87] G Zwart 'Company commitment instruments to safeguard the food/land rights of people confronted with land use shifts' (2011) ILC Policy Brief March 2011, 1.
[88] K Gehne 'Responsible investment through international investment law: Addressing rights asymmetries through law interpretation and remedies' in 'International instruments influencing the rights of people facing investments in agricultural land' (2011) ILC 90.
[89] Polack et al op cit note 43 at 26.
[90] N Cuffaro & D Hallam '"Land Grabbing" in Developing Countries: Foreign Investors, Regulation and Codes of Conduct' (2011) Working Paper 3/2011 University of Cassino and FAO 9.
[91] Polack et al op cit note 43 at 26.

be doing anything that might damage their credibility or desirability to international financial markets, and are thus generally disposed to seek and maintain good relations with investors.

To further increase protection for investments, investment contracts also increasingly include 'stabilization clauses', which either preclude or require compensation for the adoption of new regulatory measures that might affect the investment. This remains the case even if government can show that these measures are in the public interest, such as to protect human rights.[92] For example, local government might find that a TLA is drawing too much water away from local communities, causing them to struggle to irrigate their crops. It may recommend to the central government that the water allocation for the TLA needs to be revised. However, international investment treaties might consider this an act of expropriation or opportunism, which would allow the company involved to demand compensation for losses. The legal weight of stabilization clauses and the very threat of company action thus acts as a further deterrent against cash-poor governments acting in the public interest.[93] Moreover, there is no general practice in international investment law that imposes duties on investors to 'do no harm' in the places where they invest.[94] Neither are there any requirements for investors to consider the social consequences of their investments. The duty to avoid harm and respect human rights is placed on the government, but the pressure governments are under to attract and not to interfere with investment can cause them to neglect this duty.

On the whole, international trade and investment law offer strong protections against risk for investors but do not take into account the risks that investment can pose to the land, food and other rights of rural land users. IIAs tend to be either 'neutral'[95] in terms of their position on state regulation in favour of livelihoods or human rights, which leaves open the possibility for the company to sue against such actions, or include stabilization clauses that preclude such action in the first place. Like WTO trade law, there are no requirements for the negotiation of investments to

[92] AT Kate & S van der Wal (SOMO) 'Company commitment instruments to safeguard the food/land rights of people facing land use shifts' in 'International instruments influencing the rights of people facing investments in agricultural land' (2011) 31-66, 35.
[93] A Ward et al 'Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project' (2012) ILC 53.
[94] Op cit note 88 at 89.
[95] Ibid at 90.

be conducted in a participatory or transparent manner, in fact, investor confidentiality is often highly valued and the international financial industry is notoriously opaque. The end result is contracts and agreements between governments and investors that offer strong protection for investments but which often fail to take account of the needs of rural land users.

(b) Corporate Social Responsibility (CSR) initiatives and Company Commitment Mechanisms (CCM) to respect human rights

There are a number of global rule-making projects that offer forms of soft-regulation and standard setting for transnational business and investment with varying degrees of relevance for foreign investment in land. Though not legally binding, they form an important part of the global governance complex applicable to TLA, and offer opportunities to counter the lack of human rights protections in international trade and investment law. They are multi-lateral in nature, involving different configurations of partnerships between private enterprise, civil society actors, governments and international agencies. Their general aim is to improve corporate accountability for the social impacts incurred in transnational business operations by getting companies and investors to adhere to human rights and other standards, and by providing some recourse where human rights violations occur. The European Commission has defined corporate social responsibility (CSR) as:

> a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders over and above legal requirements, voluntarily, because businesses deem it to be in their long-term interest.[96]

As the European Commission definition notes, CSR measures and commitments are undertaken by businesses voluntarily, which has three major implications. The first is that there are no means in CSR mechanisms by which to force businesses to comply with human rights standards. The second is that businesses must see a self-interest in signing up to CSR. The third is that those companies that do sign up can also withdraw their cooperation if they later decide that CSR is no longer in their interest. The importance of these implications will become clearer as individual CSR and company-

[96] Cuffaro & Hallam op cit note 90 at 9.

commitment mechanisms (CCM) are evaluated. The main incentive for companies to opt in to CSR is brand valuation. Some enterprises place a high value on avoiding loss of brand reputation and therefore see CSR as a means both to enhance their brand and to mitigate against the risks that irresponsible practices could pose to it. Such enterprises can be sensitive to pressure from consumers, civil society and shareholders, which can lead them to sign up for voluntary or self-regulation.[97]

(i) *Corporate social responsibility (CSR) initiatives*

Three examples of general CSR schemes that cover all types of multi-national enterprises (MNE) are the OECD Guidelines for Multinational Enterprises,[98] the Global Reporting Initiative,[99] and the UN Global Compact.[100] The OECD Guidelines apply to MNEs from the thirty-four OECD member countries, plus ten additional countries that have agreed to sign up. They are promoted by the governments of those countries and provide 'voluntary principles and standards for responsible business conduct' in areas including human rights.[101] Each adhering government must set up a National Contact Point (NCP) whose role is to ' further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries, and contributing to the resolution of issues that arise from the alleged non-observance of the guidelines in specific instances.'[102] However, the NCPs provide a rather weak enforcement mechanism. This is because there is no effective compliance verification procedure that they regularly undertake, and there are no established consequences for non-compliance with the Guidelines. As a result, companies are under little pressure to comply and individual allegations against an OECD MNE can at best result in a 'final statement' by the NCP that holds no binding force. For example, Oxfam Canada brought a complaint against First Quantum Mining Company alleging its direct involvement in forced evictions in Zambia. Negotiation mediated by the NCP resulted in an agreement between the parties. Subsequently, however, the company breached

[97] Cuffaro & Hallam op cit note 90 at 10.
[98] See www.oecd.org/investment/mne/1903291.pdf.
[99] See www.globalreporting.org.
[100] See www.unglobalcompact.org/.
[101] Op cit note 98.
[102] OECD 'National Contact Points' http://mneguidelines.oecd.org/ncps/.

all parts of the agreement and Oxfam was informed that there was little more that the NCP could do.[103]

The Global Reporting Initiative (GRI) aims to improve transparency in foreign business dealings and standardise company disclosure and reporting on the economic, environmental and social impacts attributable to company activities.[104] The GRI has no enforcement mechanism and should be seen as an attempt to promote and encourage – rather than enforce – a more responsible and transparent transnational business environment.

The UN Global Compact, initiated in 2000, consists of ten 'universally accepted' principles on human rights, labour, the environment and anti-corruption that any company can commit to observing in its business operations. It is the basis of the UN's wider efforts to create more collaborative partnerships between business, governments, civil society, labour, and international agencies. To date 10,000 companies and other stakeholders have signed the Compact from over 130 countries.[105] It's relevance to rural land users affected by TLA is limited however by the fact that the principles are extremely vague and contain nothing specific on land, food or other rights affected by TLA. There is little monitoring of compliance with the Compact beyond annual 'Communication on Progress' reports which companies complete themselves without UN or other oversight. Failure to submit a report, or the submission of a sub-standard report can at worst result in the company being excluded from the Compact.[106]

(ii) *Company commitment mechanisms (CCM)*

While CSR initiatives tend to be vague and broad in their content and scope, company commitment mechanisms (CCM) are usually more specific, and are often designed with a specific commodity in mind. As the name suggests, company's can commit to implementing them and are usually provided with some form of certification for doing so. This certification is then used by the company to show to its consumers that it has adhered to the standards required of the scheme, thereby enhancing its brand image

[103] See OECD Watch. "Oxfam Canada vs. First Quantum Mining". http://oecdwatch.org/cases/Case_19
[104] Global Reporting Initiative 'What is GRI?' www.globalreporting.org/information/about-gri/what-is-GRI/Pages/default.aspx.
[105] UN Global Compact 'Overview' www.unglobalcompact.org/AboutTheGC/index.html.
[106] Ibid.

and adding value to its products. The two CCMs most relevant to TLA are the Forest Stewardship Council (FSC) and the Roundtable on Sustainable Palm Oil (RSPO). Around thirteen percent of TLA are for the purposes of forestry[107] which gives the FSC scheme some scope to influence how these land deals are conducted. Unfortunately there is almost no FSC certification taking place in Africa at the present time.[108] This is partly because demand for FSC certified wood from Africa is very low, few governments in Africa are actively supporting the scheme, and because of the extra costs that FSC certification puts on African forestry companies.[109] There is no way to legally enforce the use of FSC certified products, so until consumers and procurers of wood from Africa increase their demand for FSC certification, there is little incentive for producers to commit to the scheme.[110]

A significant proportion of the land being acquired in Africa is for the purposes of producing palm oil for export. For example, in 2009 China acquired 2.8 million ha of land in the Democratic Republic of Congo to create the world's largest oil palm plantation.[111] The Roundtable on Sustainable Palm Oil (RSPO)[112] is an international multi-stakeholder certification scheme designed to ensure that palm oil producers adhere to human rights and other standards in their operations. The RSPO requires producers to consider their impact on food and land rights and has been successful in attracting some major palm oil producers to sign up. It includes a grievance mechanism that has been successfully used in the context of a TLA in Liberia. Here the company involved agreed to hold dialogue mediated by an international NGO with a community whose land it had encroached upon, and to halt its operations whilst negotiations took place.[113] It is difficult, however, to assess the long-term impact of this relatively recent initiative (it was inaugurated in 2004). There are other examples of its grievance mechanism failing to have any effect on companies accused of human rights violations. In 2012 an RSPO producer that had acquired land in Cameroon was accused by a local community of infringing their right to food. However, when the company learned that the community was filing a complaint using the RSPO grievance

[107] Land Matrix 'Dynamics Overview' www.landmatrix.org/get-the-idea/dynamics-overview/.
[108] Kate & van der Wal op cit note 92 at 41.
[109] Ibid.
[110] Zwart op cit note 87 at 2.
[111] Special Rapporteur on the Right to Food, Olivier De Schutter op cit note 15 at n5.
[112] See www.rspo.org.
[113] Polack et al op cit note 43 at 46.

mechanism, it withdrew its membership from the RSPO.[114] This incident highlights the major flaw that is inherent in all certification schemes which rely on voluntary commitment from companies.

(iii) *Financial sector-specific instruments*

A complex array of hedge funds, private equity funds, pension funds, banks, state-investors, insurance companies and other kinds of financial sector organisations are investing, directly or indirectly, in TLA. In recent decades the UN has spearheaded a number of international finance sector-specific regulatory initiatives. The United Nations Environment Programme Finance Initiative was founded in 1992 with the aim of creating a global partnership between the UN and the financial sector.[115] It works with 200 financial institutions but is more of a platform for engagement and cooperation with the financial sector on UN objectives than a regulatory framework. It has thus far not come up with any agreements on land governance and has had little impact on the opacity of the financial sector. It is run mainly by financial organisations themselves, with relatively little UN oversight, and with only 200 organisations involved, has very little market coverage.

The UN Principles for Responsible Investment (UNPRI) agreed between the UN, civil society organisations and financial sector representatives in 2006, is the most widely adopted financial sector-specific regulatory initiative, having been signed by over 1,200 international investors with responsibility for more than US$34 trillion of assets, covering fifteen percent of the total global capital market.[116] The Principles commit signatories to incorporate environmental and social governance issues into their investment practices.[117]

The UNPRI is an impressive attempt to encourage the financial industry to pay better attention to the social and environmental impacts of its investments. The wide acceptance it has gained within the industry has arguably shifted perceptions on acceptable norms, particularly for institutional and listed investors, in such a way as to make it less acceptable for investors to ignore environmental and social concerns.

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[114] Ibid at 46.
[115] See www.unepfi.org/about/.
[116] www.unpri.org/news/pri-fact-sheet/
[117] See www.unpri.org/about-pri/the-six-principles/.

However, as a soft-law regulatory tool the Principles suffer major shortcomings. The qualifying clause in the statement of commitment – 'where consistent with our fiduciary responsibilities' – suggests that human rights and environmental considerations come after fiduciary matters in investors hierarchy of responsibilities. This clause potentially allows poor performing signatories to cite their fiduciary responsibilities as a valid excuse for not taking action on human rights. Compliance with the Principles is undertaken through a survey completed by investors themselves and there is no mechanism to verify reports or to hold investors that fail to apply the principles to account. Moreover, in 2011 less than half of the signatories completed the reporting survey.[118] There are no minimum entry requirements, so any investor with any track record in promoting – or failing to promote – human rights can sign up. The Principles contain nothing on land or food rights and therefore their direct impact on TLA is hard to assess.

Less than a decade old, the UNPRI have become a useful standard bearer for the international investment industry relatively quickly, but it is too early to say whether it will result in long-term improvements for poor people affected by transnational investments, and even harder to say what affect they will have on people affected by TLA.

The Equator Principles (EPs), adopted in 2003 and substantially revised in 2006, apply to financial service providers involved in project-related financing, advisory and other services (i.e. financing for development projects, broadly speaking, often through 'non-recourse loans' which must be repaid from the revenues generated by the project[119]). The EPs are a risk management framework designed to provide a minimum standard of due diligence in assessing and managing environmental and social risks associated with investment projects.[120] There are currently 79 Equator Principles Financing Institutions (EPFI) representing 35 countries and covering a large portion – 70 percent – of international project finance related loans to developing countries.[121] EP assessments place projects into a sliding scale of three categories based on their potential social and environmental risks, with each category requiring different sets of conditions designed to mitigate these risks to be applied to the loan.

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[118] www.unpri.org/news/pri-fact-sheet/
[119] Kate & van der Wal op cit 92 at 55.
[120] Equator Principles 'About the Equator Principles' www.equator-principles.com/index.php/about-ep.
[121] Ibid.

The EP have some major weaknesses that limit their potential impact on the human rights impacts of TLA. Project finance covers less than five percent of all capital investments worldwide and most TLA are not financed through this kind of investment.[122] Only five African banks have signed up to the EPs, most of whose signatories come from OECD countries. Crucially, finance for projects with the potential for significant adverse social impacts can still be approved under the EPs as long as an 'action plan' is put in place to mitigate these impacts, and a third party mediated free, prior and informed consultation with affected communities takes place. The EPs are therefore not designed to eliminate the human rights impacts of investments but to reduce them, yet there is no mechanism to actually guarantee that they are significantly reduced.[123] Moreover, communities must only be 'consulted' by project managers, it is not a necessary condition that communities actually give their consent, thus leaving room for projects to go ahead that are not supported by local people, and all the potential for conflicts that this entails. Indeed, evidence suggests that lack of effective independent oversight of EPs implementation has meant that many projects financed under the EPs have gone ahead without any consultation with communities taking place at all.[124] Borrowers facing high risks also have to provide access to a transparent grievance mechanism, however, no systematic research has been conducted thus far on the quality or functioning of these mechanisms.[125]

The CSR and CCM initiatives discussed here may be beginning to create an enabling environment for more responsible investment practices, and as soft-law frameworks they may represent the initial phase of regulatory momentum that could in the future result in some form of binding treaty or regulation for responsible investment. However, at present this seems a rather distant likelihood, and the potential positive impact of the current instruments to safeguard people's land, food and other rights is subject to serious limitations.[126]

In the absence of hard law or enforcement mechanisms, investors can continue to eschew human rights where they operate, without much risk of recourse. The

[122] Kate & van der Wal op cit note 92 at 55.
[123] BankTrack 'The Outside Job: Turning the Equator Principles towards people and planet' (2011) 16. www.banktrack.org/manage/ems_files/download/the_outside_job/111021_the_outside_job_final.pdf.
[124] Kate & van der Wal op cit note 92 at 55.
[125] BankTrack op cit note 125 at 8.
[126] Kate & van der Wal op cit note 92 at 60.

voluntary nature of the initiatives means that 'free riders' can ignore them if they choose. Very weak compliance, oversight and verification mechanisms are often combined with poor access to effective remedies. For example, there are no consequences for companies shown to have breached OECD Guidelines, and no means of enforcing redress.[127] Most investors are primarily concerned with the 'bottom line' profit to be gained from their endeavours, and without hard law forcing them to do so, will continue putting (often short-term) profit incentives before other considerations. Self-interest, often related to brand management, remains the greatest incentive for businesses to commit to CSR and CCM, but many view the costs in time and money associated with signing up to voluntary regulation as a burden they can do without.[128] Enhancing buyers markets for certified products is one way to put more pressure on companies to adhere to certification schemes, which on the whole offer the most protection for food and land rights. Governments in both developed and developing nations can encourage this through legislation, tax and other incentives, and through their own procurement policies. However this is a long process that is also reliant on consumer demand for socially responsible products, which at present remains relatively low and heavily restricted to OECD consumer markets. Most of the signatories to CSR and CCM initiatives are also from OECD countries, which means that the vast majority of international investors, especially those with dramatically increasing portfolios from the emerging markets, continue to operate outside of these frameworks. Even within the OECD, very little of the total market has signed up. Across the world, the financial industry is infamous for its opacity. The evidence that finance sector-specific soft instruments are having any impact on transparency is minimal, and even less in terms of positive impacts on the ground for vulnerable people affected by investment activity.

CSR and CCM initiatives are generally in early stages of development and their long-term impacts on the human rights of populations affected by transnational business and investment is hard to judge at this stage. There are many opportunities for improvement and for increasing the scope of these initiatives, particularly beyond the OECD market. However, the key shortcomings outlined above mean that these soft-regulatory frameworks may not be the solution to the current difficulties that TLA are posing to rural land users.

[127] Zwart op cit note 87 at 3.
[128] Cuffaro & Hallam op cit note 90 at 11.

(c) Domestic legal frameworks

For TLA to produce benefits for local land users as well as foreign investors, an appropriate institutional framework in the host state must be in place. With fifty-three governments of various political stripes, Africa is home to a diverse array of land governance frameworks and rights regimes, including private, public, community and customary land ownership arrangements. It also has a wide range of legal frameworks applicable to TLA, although the boundaries for national trade and investment policy are to a large extent shaped by international trade and investment treaties. This is particularly the case in terms of what protective policy measures, including in relation to land and other human rights, governments are able to take in relation to investments.[129] Indeed, in recent years many governments have adopted investor friendly law reforms that include the easing of social and environmental standards required for acceptable or responsible investment.[130] As the case studies in chapter II illustrated, governments under pressure to attract foreign investment in land have shown a willingness to do so at the expense of the land and other rights of rural communities.

Margulis et al have identified five key areas where the typical African state exerts control over foreign investment in land: (i) 'invention/justification' of the need for large-scale land investments; (ii) 'definition, reclassification and quantification' of what is 'marginal, under-utilized and empty' lands; (iii) 'identification' of these particular types of land; (iv) 'acquisition/appropriation' of these lands; and (v) 'reallocation/disposition' of these lands to investors.[131] Important to note here is the fact that, following on from their colonial antecedents, land in Africa remains largely under the control of central governments, who are thus the main role-players in making land available to private investors and in negotiating land deals. In some countries, such as Ethiopia, Mozambique and Zimbabwe, land is almost fully nationalised.[132] However, weak land governance as a result of a lack of capacity, poor land legislation, and little access to justice for rural communities, undermines central government's ability to ensure that rural land users are not marginalised by land deals.

[129] Bonanomi op cit 83 at 81-82.
[130] Polack et al op cit note 43 at 23.
[131] M Margulis et al op cit note 3 at 5-6.
[132] Polack et al op cit note 43 at 19.

Many central governments in Africa do not have the capacity to collect information on and effectively manage the vast swathes of land under their control. As a result, governments often fall into the trap of making what they see as 'marginal' or 'unused' land available for investors without full knowledge of its boundaries, whether it is already being used, and who lives on it.[133]

This lack of capacity also makes it difficult for central governments to enforce land legislation, which itself is often weak in terms of recognition of rural land rights. Many rural communities use land under customary tenure arrangements that lack statutory legal recognition. This can be attractive to investors, who may find it easier to acquire land in a country without effective legal protection for the land used and occupied by rural communities. For some, this explains why two-thirds of the reported land grabs have been in Africa, where around 700 million people live on land that is customarily owned but has insecure tenure under national law.'[134] While a foreign investor's entitlement to land under its contract may be easily enforced, the local farmers that used the land previously may struggle to claim the rights that attach to their customary ownership if such ownership isn't recognised by the state. In Tanzania, for example, only 850 out of around 14,000 villages have a certificate for their land under law, while in Uganda no communities have secured collective titles.[135] Lack of recognition of customary land rights can mean that it is 'perfectly legal for a government to allocate land to a company with minimal consultation and transparency, and with paltry compensation payments for local groups.'[136] Where private or customary land ownership is recognised, inaccessible land registration procedures ensure that most land remains unregistered and thus defaults to the control of the state.[137] As a result, local communities control over their land can become extremely fragile when it becomes of interest to foreign investors.

Where land is not held by the state, traditional authorities such as local Chiefs often have ultimate decision-making power for land allocations. Evidence suggests that traditional authorities can be coerced into giving away land by the application of political, financial or other pressure. Case studies from Ghana, where Chiefs are the

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[133] S Borras & J Franco 'Towards a Broader View of the Politics of Global Land Grab: Rethinking Land Issues, Reframing Resistance' (2010) ICAS Working Paper Series No. 001, 19.
[134] RRI op cit note 12 at 19.
[135] Polack et al op cit note 43 at 20.
[136] Ibid at 2.
[137] L Cotula 'Land Deals in Africa: What is in the Contracts?' (2011) IIED 16.

first port of call for investors looking for land, have found that '[m]any chiefs have engaged in appropriating lands for personal use, and in renting or even selling it to outsiders for personal gain.'[138]

Local rural people's rights to their land can also be undermined by the legal requirement that the land user is able to demonstrate 'productive use' of the land, which may be difficult to do, particularly in the case of fallow, forest, or grazing lands.[139] The legal concept of 'public purpose' is also widely employed to expropriate privately and customarily held land rights for projects deemed to be in the public interest, which can include TLA.[140]

Moreover, much of the current land and investment legislation in Africa does not require social impact assessments (SIA) to be carried out when land is transferred to foreign investors. Where SIA are required, the law tends to lack clarity over the standards that must be met, the independence of the assessor, public access to information requirements, and the extent to which project implementation is dependent on a successful SIA, and to what extent investors are liable for mitigation plans.[141] A number of case studies demonstrate that, where SIA are required, TLA have gone ahead without the assessment ever taking place.[142]

Where land has been 'grabbed' and local land users dispossessed, access to justice is rarely available for rural land users. There is a widespread lack of legal awareness among rural communities, a lack of resources required for litigation, deference towards local and national authority, and a mistrust of courts and formal legal procedures.[143] On the other hand, many TLA can be formerly legal acts in that they adhere to procedures established by applicable law. Nevertheless, they may be unjust or illegitimate from a human rights perspective. Unfortunately, international and regional human rights law has thus far failed to empower rural land users to protect and advance their rights against foreign investors and host governments.

(d) International human rights law

[138] Polack et al op cit note 43 at 22.
[139] Ibid at 21.
[140] Ibid.
[141] Polack et al op cit note 43 at 25.
[142] Cotula op cit not 137 at 30.
[143] Polack et al op cit note 43 at 26.

Chapter II discussed some of the rights that international human rights law accords to rural land users. These included rights to land, housing, against forced evictions, to food, to a sustainable livelihood and environment, to participate in and receive information about TLA, and for many, indigenous rights which include the right to FPIC for major investment projects. These rights are derived from international human rights treaties to which most African states are a party, as well as from international customary law, which includes a multitude of declarations, general principles, guidelines, and resolutions of various UN bodies, which also place restrictions on states ability to infringe the rights of their citizens. This chapter has shown that many governments, which are the primary duty bearer for enforcing these rights, are failing in their obligations when it comes to TLA. It has also shown that international trade and investment law places few obligations on investors to respect human rights. The question then arises, to what extent can international human rights instruments and mechanisms hold states and international investors accountable for the human rights impacts of TLA?

(i) *UN Charter based mechanisms*

There are two groups of mechanisms through which the United Nations enforces international human rights law: Charter-based mechanisms and Treaty-based mechanisms. The former have grown out of the UN Charter and the latter are derived from human rights treaties agreed between states. The Human Rights Council (HRC) is charged with overseeing Charter-based mechanisms, the most influential of which are the Universal Periodic Review (UPR) and various 'special procedures'. The UPR reviews every UN member states compliance (whether they are parties to human rights treaties or not) with all internationally recognised human rights every two years. Unfortunately the time constraints of the review process and the large number of human rights under consideration at each UPR review session means that there is little opportunity for any in-depth focus on specific human rights violations, or clusters of violations.[144] Moreover, the recommendations issued to states at the end of the UPR are not binding, and if states fail to implement them by the time of the next review session, there is little the HRC can do beyond reminding the state of its obligations.

[144] Cochrane & McNeilly 'The United Kingdom, the United Nations Human Rights Council and the first cycle of the Universal Periodic Review' (2013) 17:1 *The International Journal of Human Rights* 170.

Special procedures established by the HRC provide further opportunities for the UN to promote human rights. They include 'special rapporteurs' who are internationally respected human rights experts with mandates from the HRC to address human rights issues on a thematic basis or in relation to particular human rights.[145] Special Rapporteurs can undertake country visits in line with their thematic mandate, which are followed by reports submitted to the HRC on the standard of protection being afforded to particular rights or groups of rights in a country. They can also receive individual complaints from aggrieved parties in any country without any requirement for the prior exhaustion of domestic remedies. However, Rapporteurs can only respond to such complaints by issuing 'urgent appeals' or 'letters of allegation' to states, which though made public, are not legally binding. On average only one in three reports from Special Rapporteurs elicit a response from governments.[146]

Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (SRSG Ruggie), has in recent years developed the international human rights law response to rights violations occurring as a result of the operations of transnational businesses. Ruggie was mandated by the HRC to develop Guiding Principles on Business and Human Rights, which were unanimously endorsed by the HRC in October 2012 in HRC resolution 21/5. Ruggie's contribution to the legal complexity of transnational business and human rights is thus worthy of some consideration, though like the UPR, it suffers from major shortcomings in relation to enforcement. Indeed, Ruggie notes in his report to the HRC that he has developed a guide and no more, and does not expect it to be universally implemented by the 80,000 transnational corporations of 192 UN member states.[147]

The Guidelines recognise the longstanding human rights law principle that states have obligations to respect, protect and fulfil human rights, but emphasise that this includes the duty to protect citizens against potential and actual abuses of human rights by transnational business enterprises operating within their territories. The

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[145] Special Rapporteur on the Right to Food, Olivier De Schutter, is the only Rapporteur to have taken up the issue of human rights violations occurring as a result of TLA. The 'minimum principles' he has come up with will be discussed as one of the four responses to TLA evaluated in Chapter IV.
[146] Simone op cit note 55 at 22.
[147] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 Mar 2011) UN Doc. A/HRC/17/31, para 15.

Guidelines state that compliance with human rights law requires that states take 'appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.'[148]

Ruggie also emphasises that under international human rights law the state is not the only actor with responsibility for protecting and promoting human rights. The Guidelines detail how business enterprises and investors also have obligations arising from existing human rights law. These include duties to protect and respect human rights where they do business, and to provide access to effective remedies where rights are infringed as a result of their operations.[149] These duties exist independently of the host states ability or willingness to fulfil its own obligations, and businesses should never do anything to undermine this ability or willingness.[150] The responsibilities of transnational businesses include carrying out due diligence processes to identify, prevent, mitigate and account for the human rights impacts of their operations.[151] At a minimum, this due diligence requires 'meaningful consultation with potentially affected groups'.[152]

Ruggie's guidelines are inspired by the existing provisions of the International Bill of Rights, other UN treaties, and the ILO Declaration on Fundamental Principles and Rights at Work. The Guidelines do an excellent job at elaborating these existing standards and integrating them into a coherent and comprehensive HRC endorsed guide for transnational businesses, civil society, government and various judicial bodies interested in the nexus between states, transnational businesses and human rights.[153] However, the Guidelines themselves do not create new law and are not binding upon states or businesses. They include no mechanism to enforce compliance or to review their implementation. Some writers have argued that in time the significance of the Guidelines may become more apparent. For example, Blitt draws on the experience of the UDHR to argue that 'aspirational non-binding principles, or "soft law," can evolve continually over time into more durable and enforceable "hard law" – either in the form of a written treaty or in the consolidation of customary

[148] SRSG Ruggie, op cit note 147 at I.A1.
[149] Ibid at II.A.13.
[150] Ibid at II.A.11.
[151] Ibid at II.A.15.
[152] Ibid at II.B.18(b).
[153] RC Blitt 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance' (2012) 48:1 *Texas International Law Journal* 43.

international practice.'[154] TLA are, however, an existing phenomena affecting large numbers of people and thus requires more immediate attention. At this stage, the Guidelines do not constitute a significant challenge to the binding and well-enforced international trade and investment law that regulates foreign acquisitions of land.

(ii) *UN Treaty based mechanisms*

The main mechanism for enforcing and reviewing states compliance with international human rights treaties is the state reporting procedure. States Parties to a treaty must submit periodic reports (usually every four years) to the relevant treaty monitoring body (TMB), while civil society actors can contribute to this process by submitting 'shadow reports' that offer an alternative analysis of the human rights situation in the country. The TMB reviews these reports, meets with representatives of the state and civil society at a review session, and then issues 'concluding observations' or 'concluding recommendations' to the state on how it can improve its observance with the treaty. The process applies scrutiny and some authoritative international pressure on states to comply with their human rights obligations, and provides a platform for government, civil society, and international monitors to debate and discuss the human rights situation in the country. UN Secretary General Ban Ki-moon has called the treaty body system, and the state reporting procedure by which it is enforced, 'the indispensable link between universal standards and the individuals they were designed to empower and protect.'[155]

The state reporting procedure, does, however, have some major shortcomings. Many treaties have over 150 States Parties and TMBs have long lacked the capacity to keep up with the volume of reports they receive from governments and civil society. As of March 2012, a total of 281 state reports were awaiting consideration by the various TMBs, and the average waiting time between a state submitting its report and that report being reviewed by the TMB was two to four years.[156] These delays mean that the information and data contained in the report is likely to be severely out of date by the time it is reviewed, and the prospect of any immediate human rights concerns being resolved is low. This also causes any momentum built up within and between

[154] Ibid at 41.
[155] Cited in Navanethem Pillay 'Strengthening the United Nations Human Rights Treaty Body System: A report by the United Nations High Commissioner for Human Rights' (June, 2012) 16.
[156] Ibid at 19.

government and civil society in the processes leading to the submission of reports to be lost.

As well as lacking the capacity to deal with the current number of reports, TMBs are also hamstrung in their ability to enforce treaties because in many cases – particularly for states who have the worst human rights records – States Parties are very overdue on their reporting responsibilities. In 2010 and 2011, only 16% of all reports that were due were submitted on time, and despite one-year grace periods being granted to all late states, still after this period only one third of reports had been submitted on time.[157] For five out of the nine TMBs, over 20% of states parties have never submitted a single report, and have therefore ratified treaties but have never actually been reviewed for compliance. As of April 2012, a total of 626 State Party reports were overdue for submission to the nine TMBs.[158] Despite report submission being central to the enforcement of human rights treaties, the TMBs have no mechanisms by which to force states to submit their reports.

In addition to the state reporting procedure, five core treaties now have Optional Protocols creating Individual Communication Procedures and/or Inquiry Procedures.[159] The former allow individuals or their representatives to petition a TMB for redress of alleged violations of a human rights treaty. The latter allows the TMB to inquire into and investigate grave or systemic violations of human rights in a State Party. There may be more scope for Individual Communications Procedures and Inquiry Procedures to be used in relation to TLA once the Optional Protocol to the ICESCR comes into force.[160] This will allow complaints to be brought to the CESCR on alleged violations of the rights to food, housing and livelihoods. However, there are two key limitations to these procedures. The first is the requirement that before making an individual complaint one must exhaust the internal justice system where the alleged grievance has occurred. This can be a vast, costly, and lengthy process which rural land users threatened with dispossession or other rights violations resulting from a TLA are unlikely to be able to afford. The time required for such processes to take

[157] Ibid at 20.
[158] Ibid.
[159] The International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Racial Discrimination ; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment; the Convention on the Elimination of All Forms of Discrimination against Women; and the Convention on the Rights of Persons with Disabilities.
[160] At January 2014 the OP has received two out the ten ratifications required for it to enter into force.

place alone makes utilisation of the UN system a distant option for many people seeking immediate relief to a human rights related grievance. Moreover, strict admissibility requirements have meant that most communications are never reviewed by the TMBs. For example, in 2009 only 110 out of 9900 communications were admitted for consideration by the TMBs.[161] There are also currently no means by which complaints can be made against transnational businesses or investors through the UN charter mechanisms nor through the treaty-based mechanisms as there is no treaty directly related to businesses and human rights or which directly binds non-state actors to adhere to human rights standards. Moreover, there is little the TMBs can do to enforce their decisions on complaints and investigations.

International legal efforts to prove that a TLA has violated rights to food, land, housing or other rights would involve a lengthy process of litigation and research at multiple levels. At present, all of the potential UN level mechanisms on offer suffer flaws that make one question whether such efforts would be worthwhile for rural land users. Submitting a report to the HRC through the UPR process is unlikely to yield many benefits as the UPR does not focus on specific rights violations and the recommendations issued to states are not legally enforced. Complaints could be made to Special Rapporteurs but their decisions are also not legally binding. SRSG Ruggie's Guidelines on Business and Human Rights, while providing encouragement to investors to consider human rights when investing abroad and building some momentum in international law on the human rights obligations of transnational businesses, do not have a legally binding complaints mechanism or any means by which to review implementation. In general, the HRC mechanisms are designed to hold states accountable for human rights, not investors. The TMBs that enforce human rights treaties are over-stretched and suffer from equally weak enforcement: state reports are not received or reviewed on time, few individual communications are acted upon, and TMB decisions, though holding some weight in international law, are merely 'recommendations' that cannot be enforced on states. UN procedures for enforcing human rights are most effective when applied to states with open and democratic political and civil structures and who are genuinely concerned about their human rights records and their international prestige. In the absence of hard enforcement mechanisms, the UN struggles to advance human rights in countries

[161] T Piccone 'The contribution of the UN's special procedures to national level implementation of human rights norms' (2011) 15:2 *The International Journal of Human Rights* 218.

where publicity through civil society and the media – the UN's most powerful tool – is restricted. Overall, UN human rights mechanisms are largely inaccessible to rural land users due to the time, resources, and financial costs associated both with engaging the UN system, and exhausting domestic legal remedies. As a result, there has been no use thus far of international human rights institutions directly related to the global land rush.[162] Advances in international human rights law, particularly in relation to enforcement and access to remedy, have not kept the pace with the substantial safeguards that international law has come to accord to foreign investment.[163]

(e) Regional human rights law

Development and political stability remain among the highest priorities for the African continent, which can be seen in the emphasis on development in the 1981 African Charter and in the equal recognition it accords economic, social and cultural rights with civil and political rights. The Charter established the African Commission on Human and Peoples' Rights, whose mandate is to 'promote human and peoples' rights and ensure their protection in Africa'.[164] In 1998, a Protocol to the Commission was signed establishing an African Court on Human and Peoples' Rights, which came into force in 2004 and has gradually become the main judicial enforcement mechanism of the African regional human rights system.[165] In 2008 the Court had a new human rights section added to it called the African Court of Justice and Human Rights. Though these two courts are currently operating together, creating (at least temporarily) a confusing aspect to Africa's human rights system, the latter will replace the former once it receives the required number of member state ratifications. As well as the African Charter, the Commission and Courts can 'draw inspiration from' all other international human rights law instruments and jurisprudence,[166] while the Courts may consider the obligations arising from any other human rights instruments

[162] Polack et al op cit note 43 at 27.
[163] Polack et al op cit note 43 at 2.
[164] African Charter on Human and Peoples' Rights (Nairobi, Kenya, 27 June 1981), 21 I.L.M. 59 (1981), entered into force 21 October 1986, art 30.
[165] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol on the African Court, adopted June 1998) OAU/LEG/MIN/AFCHPR/PROT (I) Rev 2.
[166] African Charter, art 60.

ratified by the state under review.[167] These provisions give the judicial bodes a wide basis for human rights protection and interpretation.

The right to food is not expressly provided for in the African Charter but the African Commission has found it implicitly recognised in the rights to dignity, health and development.[168] The 2005 Protocol on the Rights of Women in Africa[169] is a supplement to the Charter and provides an extra source of law for the Courts when adjudicating alleged violations of women's rights. It explicitly recognises the right to food in article 15(a), as well as the means of producing food, which includes access to land. Article 14 of the African Charter on the Rights and Welfare of the Child provides that States are also obligated to ensure that children have access to adequate nutrition.

The right to own property is guaranteed in article 14 of the Charter, which allows encroachment on this right where a 'general interest' or 'public need' can be shown. Article 21 provides that people unlawfully dispossessed of their property have the right to receive adequate compensation. However, some scholars have argued that the public interest provisions of article 14 mean that the Charter is weaker on property rights than other international human rights law documents, because these articles read together do not explicitly require states to pay compensation in the event that the right to property is infringed.[170] The right of access to adequate housing has been derived from the right to property in article 14 and thus also receives weaker protection than that accorded to it in the ICESCR and by the CESCR in General Comment No. 4, which guarantees legal protection against forced eviction.[171]

The African Women's Protocol also provides rights to a healthy and sustainable environment[172] and to sustainable development, which requires states to 'promote women's access to and control over productive resources such as land and guarantee their right to property'.[173] The right to sustainable development also includes the right of women to participate 'at all levels in the conceptualisation,

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[167] Protocol to the African Charter on the African Court at art 3(1) and Protocol on the Statute of the African Court of Justice and Human Rights, art 28(c).
[168] Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria, African Commission on Human and People's Rights, Communication No. 155/96 (2001) para 65.
[169] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa *(henceforth the African Women's Protocol).*
[170] Polack et al op cit note 43 at 26.
[171] CESCR General Comment 4 on The Right to Adequate Housing (13 Dec 1991) UN Doc E/1992/23, art 8(a).
[172] African Women's Protocol, art 18.
[173] Ibid at art 19(b).

decision-making, implementation and evaluation of development policies and programmes'.[174]

Due to the limitations of the UN human rights system outlined above, a legal strategy seeking recourse for human rights violations resulting from a TLA may consider petitioning the African Commission or the African Court of Human and Peoples' Rights (ACHPR). To date this has not occurred, although there is precedent within the African system for adjudicating some of the contentious issues that could arise out of a case involving a foreign land acquisition. In *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, the African Commission held that foreign companies operating in the Niger Delta region had caused intolerable levels of health and other damage to the Ogoni peoples due to the environmental degradation and pollution caused by their operations.[175] It found that the Nigerian government had failed to uphold the Ogoni's rights to property, health, food, livelihood, housing, and to sustainable development and a healthy environment.[176] Crucially, it found that the government had given a 'green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis'[177] and therefore that human rights were violated in part due to the government's failure to uphold its obligations to effectively monitor and regulate the activities of the foreign companies.[178] The Commission ordered the government to, inter alia, investigate the human rights violations that had resulted from the activities of the oil companies; provide relief, resettlement and compensation to the victims of those violations; ensure that appropriate environmental and social impact assessments were prepared with independent oversight for any future oil development projects; and provide adequate information to the Ogoni peoples on the risks associated with such projects.[179] The Commission stopped short of calling for the FPIC of communities affected by such projects and did not make any orders directly against the foreign oil companies.

In *CEMIRIDE and Minority Rights Group International v Kenya* the African Commission found that the Kenyan governments forced eviction of the Endorios – a

[174] Ibid at art 19(c).
[175] Supra note 168 at para 67.
[176] Ibid at holding.
[177] Ibid at para 58.
[178] Ibid.
[179] Ibid at holding.

pastoral group dispossessed of their land in order to make way for a game reserve in 1979 – had violated their rights to, inter alia, property, a cultural life, self-determination and development.[180] The Kenyan government had not respected the Endorios rights to property or secure tenure because it had denied them full title to their land, which allowed the government to dispossess the Endorios unlawfully and without compensation.[181] The Commission also found that 'the upheaval and displacement of the Endorios from the land they call home and the denial of their property rights over their ancestral land [was] disproportionate to any public need served by the Game Reserve.'[182] This decision was, however, heavily influenced by the classification of the Endorios as indigenous people, which gave them extra protections under international law. As previously stated, it is unclear whether all rural land users affected by TLA would also receive this extra protection.

These two landmark cases demonstrate the African Commission's willingness to hold governments accountable for mass violations of the rights to property and land, food, livelihood, housing and environment. In *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* the Commission emphasised that the states duty to protect human rights included duties to ensure that private operators do not infringe on human rights as a result of their operations, although, as its jurisdiction extends only to the state, the Commission was unable to place any order directly against the oil companies doing business in the Niger Delta. This case also showed that the Commission is willing to uphold the programmatic rights to participation and access to information for communities affected by large development projects. However, as a potential avenue for rural land users affected by TLA, the African regional human rights system may not provide an easy, quick, or cheap access to remedy. The first reason for this is that the decisions of the African Commission are non-binding. The Commission can only 'draw attention' to the human rights situation under review, submit a report stating its findings, and make 'recommendations' regarding the relief governments ought to provide.[183] The two Courts can issue binding judgements, however, only 26 out of 53 African states have

[180] *CEMIRIDE and Minority Rights Group International v Kenya*, African Commission on Human and Peoples' Rights, Communication No. 276/2003 (2003) at recommendations.
[181] Ibid at para 199.
[182] Ibid at para 214.
[183] African Charter arts 52-53.

ratified the protocol establishing the ACHPR,[184] while only three states have ratified the protocol establishing the ACJHR, which requires fifteen ratifications before it can replace the ACHPR and enter into force.[185]

At the Commission, the process of reviewing complaints is largely secretive as article 59(1) of the African Charter provides that findings are kept confidential until the Assembly of Heads of State and Government decide to make the complaint and their findings public, which can take some time. More time is required on the part of litigants because both the African Commission and the Courts require domestic remedies to be exhausted before petitions can be considered, which, as previously stated, can prove very difficult for the rural poor. In the cases considered above, the communities affected received a great deal of assistance by non-governmental organisations who took up their cause and garnered significant international and regional support. Moreover the human rights violations, particularly in the case of the oil disasters in the Niger Delta, were well publicised in international and regional media, giving the Commission extra incentive to consider the case and pass an authoritative judgement. In any case, rural land users aggrieved by a TLA would also have to rely on enormous support from NGOs and other supporters to have their concerns supported and raised all the way through both domestic and then regional judicial mechanisms.

There is also a high-level of uncertainty as to whether the Commission or the Courts would wish to pass judgement, and what that judgement would be, on the question of the developmental or public interest case for TLA. The ‘general interest’ and ‘public need’ provisions in article 21 of the charter on the right to property would likely be drawn upon by a government wishing to argue that a TLA was necessary and that its encroachment on the property of rural land users was therefore justified. Determining whether this is true would put the Commission or the Court into the highly contested policy terrain surrounding the role of large-scale foreign owned farm projects in the agricultural and rural development of African economies. This chapter has shown how many TLA, despite infringing on the human rights of rural land users, were carried out legally under applicable domestic law. It is therefore uncertain as to the extent to which the Commission or the Courts would be willing to both overrule

[184] www.au.int/en/organs/cj.
[185] Burkina Faso, Libya and Mali.www.african-court.org/en/index.php/vacancies-3/frequent-questions.

such law and/or to pass judgement on whether any expropriation of property was indeed in the 'general interest'.

The African regional system for the promotion and protection of human rights is in something of a period of transition and its potential to have a significant impact on the rights of rural land users affected by TLA is unclear. Currently there is a Commission and two Courts empowered to enforce human rights on the continent, and these bodies are in the process of learning how to work together to effectively fulfil their separate but interlinked mandates. The Courts are meant to 'complement and reinforce' the functions of the African Commission, especially its protective mandate,[186] which is why they are able to issue binding decisions. Yet it remains uncertain which kinds of cases will be dealt with by each body and what the relationship between them will be.[187] For these reasons it is highly uncertain whether the African regional system provides a suitable avenue for petitions concerning the human rights impact of TLA.

IV. FOUR GLOBAL GOVERNANCE RESPONSES TO TLA: A PRELIMINARY ASSESSMENT

A recent report by the International Land Coalition concluded that the drivers of the global land rush are likely to persist in the long-term and that an effective long-term regulatory response is therefore necessary, as well as urgent action to mitigate the short-medium term impacts of badly negotiated TLA.[188] Central to any assessment of the current responses to the human rights impact of TLA is whether they significantly alter power relations between locals, investors and governments. Locals must be empowered to claim their rights and to defend and advance their interests. Governments and companies must be held to account to ensure that land deals are conceived democratically and transparently, benefit local people and contribute to broader development objectives. There have been four major international responses to the global governance gaps and legal complexity of foreign acquisitions of land. These are the Minimum Principles and Measures to address the human rights challenge of large-scale land acquisitions propounded by the United Nations Special Rapporteur on

[186] Protocol to the African Charter on the African Court art 3(1).
[187] R Murray 'A Comparison Between the African and European Courts of Human Rights' (2002) 2:2 *African Human Rights Law Journal* 196-197.
[188] Anseeuw et al op cit note 21.

the right to food and endorsed by the Human Rights Council; the International Finance Corporation's inclusion of Land Acquisition and Involuntary Resettlement as a specific category of concern in its influential and recently updated Performance Standards; the Principles for Responsible Investment in Agriculture (PRAI) jointly developed by the World Bank, FAO, UNCTAD and the IFAD; and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security agreed between governments, civil society and international agencies and endorsed by the Food and Agriculture Organisation of the United Nations (FAO), the Committee on World Food Security, the G20 and the UN General Assembly. As all of these responses are less than five years old, a preliminary assessment can be offered on their potential to enhance the protection and promotion of the human rights of communities affected by TLA.

(a) The Minimum Principles of the United Nations Special Rapporteur on the Right to Food

The first official international response to the human rights impact of TLA came from the Special Rapporteur on the right to food, Olivier De Schutter, in 2009. De Schutter drew up what he called 'Minimum Principles and Measures' to address the human rights challenge of large-scale land acquisitions and leases.[189] He was alarmed that countries selling or leasing their most arable farmland to foreign investors 'often have no development plan for food security in place and do not systematically assess any possible negative social impacts of specific land investments beforehand.'[190] In his mandate as Special Rapporteur,[191] De Schutter set out to 'provide guidance to ensure that these investment agreements do not lead to violations of the human right to adequate food.'[192]

The Minimum Principles are based on the obligations that arise from article 11 of the ICESCR and from General Comment No. 12 of the CESCR on the right to food. In particular, De Schutter draws attention to the provision that states must 'refrain from infringing on the ability of individuals and groups to feed themselves where such

[189] Op cit note 15.
[190] Zwart op cit 87 at 1n1.
[191] Human Rights Council 'Mandate of the Special Rapporteur on the Right to Food' (26 September 2007) UN Doc. A/HRC/6/L.5/Rev.1, 1*(a)* and 1*(b)*.
[192] Special Rapporteur on the right to food, Olivier De Schutter op cit note 15 at para 2.

an ability exists (respect), and to prevent others – in particular private actors such as firms – from encroaching on that ability (protect).'[193] He also notes that international finance institutions and development banks have a duty to ensure that the right to food is not impaired by their lending policies.[194]

De Schutter was primarily concerned with the impact that TLA are having on rural peoples access to resources essential to their sustenance and livelihoods. His Principles focus on the procedural requirements that states and investors must follow in order to ensure that such peoples food security and land rights are not threatened. The Principles require that negotiations leading to a TLA must be conducted in a 'fully transparent manner, and with the participation of local communities' (Principle 1). Principle 2 requires that shifts in land can only take place with the free, prior and informed consent of the local communities concerned. Principle 3 requires states to legally recognise all land users rights to land and Principle 4 provides that investment agreements ensure adequate benefit sharing between communities, government and investors when TLA take place. Principles 5 and 6 encourage states to promote labour intensive and environmentally friendly farming projects. Principle 7 provides that investment contracts must place clear and explicit obligations on investors to respect human rights and Principle 8 requires TLA contracts in food-importing countries include a clause which ensures that a percentage of the food produced in the acquired land is sold to domestic markets. Principle 9 requires participatory impact assessments to take place which evaluate the potential impact of TLA on local incomes; access for locals to productive resources; protection for the environment, including soil and water quality; and that the availability and adequacy of local food supplies are not disrupted by TLA. Principle 10 reminds states of their extra obligations towards indigenous communities and Principle 11 requires that TLA respect the labour rights of any local people employed on a foreign owned farm project.

The impact of the Minimum Principles has been mainly normative. They were the first official attempt to stimulated debate on the human rights challenge of TLA at the international level and have helped to ensure that that debate interprets TLA as a human rights issue. This has been the case in relation for the Voluntary Guidelines adopted by the FAO which are evaluated in section *(d)* below. As Chapter 3

[193] Special Rapporteur on the right to food, Olivier De Schutter op cit note 15 at para 3.
[194] Special Rapporteur on the right to food, Olivier De Schutter op cit note 15 at para 5.

illustrated, however, the enforcement mechanisms of the UN special procedures are too weak to effectively enforce the Principles. Therefore, although De Schutter provides an authoritative articulation of the existing human rights law norms applicable to TLA, the Special Rapporteur was unable to provide any new mechanism by which to ensure that TLA do not violate human rights. The impact of the Principles on the ground or in specific incidences of human rights violations occurring as a result of TLA is therefore limited: their influence lies in providing a human rights law basis and benchmark upon which stronger regulatory responses can be assessed.

(b) Performance Standards of the International Finance Corporation (IFC)

The International Finance Corporation (IFC) is the private-sector financial arm of the World Bank Group. It is owned by 184 member countries and provides financial services, from loans to advisory products, for private sector projects in more than 100 developing countries. Its purpose is to help 'companies and financial institutions in emerging markets to create jobs, generate tax revenues, improve corporate governance and environmental performance, and contribute to their local communities.'[195] The IFC has increased its lending to agribusiness projects from US$2.5 billion in 2002 to US$6-8 billion in 2012.[196] Oxfam estimates that a significant proportion of these investment projects involve TLA.[197] Through its advisory services, the World Bank and IFC have also been 'helping developing country governments to make it easier for foreign investors to acquire land and encouraging them to offer tax holidays, thereby creating a fertile investment climate for land acquisitions.'[198]

The Performance Standards (PS) are the centrepiece of the IFCs wider policy on environmental and social sustainability. According to the IFC, they are 'designed to help clients avoid, mitigate and manage risk as a way of doing business sustainably.'[199] Any client proposing an investment project that is determined to pose a moderate to high risk of environmental and/or social impacts must carry out that investment in accordance with the PS.[200] Many state-owned banks and investment

[195] IFC 'IFC Annual Report 2013: We can end extreme poverty in a generation and boost shared prosperity' 98.
[196] Oxfam 'Our Land, Our Lives: Time Out on the Global Land Rush' (Oct, 2012) 10.
[197] Ibid at 9.
[198] Ibid at 10.
[199] IFC op cit note 195 at 98.
[200] Ibid at 3.

agencies also benchmark their projects against the Performance Standards of the IFC. This includes 32 export credit agencies from the OECD, the Multilateral Investment Guarantee Agency (MIGA, part of the World Bank Group which provides political risk insurance guarantees) and 15 European Development Finance Institutions. The PS have also been incorporated into the 'Equator Principles' which were discussed in the previous chapter. Therefore, although they are primarily designed to apply to IFC clients, the influence of the PS extends beyond direct IFC activities: they are recognised internationally as a leading benchmark for social risk management.

There are eight Performance Standards which cover the following areas: 1. the assessment and management of environmental and social risks and impacts; 2. labour and working conditions; 3. resource efficiency and pollution prevention; 4. community health, safety, and security; 5. land acquisition and involuntary resettlement; 6. biodiversity conservation and sustainable management of living natural resources; 7. indigenous peoples; 8. cultural heritage.[201]

PS1 provides that the process for investment projects must include free, prior and informed consultations with local communities, but falls short of requiring local peoples consent for the project to go ahead. This is weaker than the guidelines offered by the Special Rapporteur on the right to food, which establish the free, prior and informed consent of affected communities as an international human rights norm. It also fails to acknowledge the legal right of indigenous communities to free, prior, and informed consent.

PS5 on 'land acquisition and involuntary resettlement' is a new addition to the most recent PS, which took effect from January 1, 2012. PS5 is concerned with avoiding or minimizing involuntary physical and economic displacement resulting from IFC project-related land acquisitions.[202] The IFC accepts that involuntary resettlement as a result of 'lawful expropriation or restrictions on land use' may be 'unavoidable'.[203] In such cases PS5 requires investors to take 'appropriate measures to mitigate adverse impacts on displaced persons and host communities'.[204] Involuntary displacement can have serious economic, social and cultural consequences, as Chapter II illustrated. The fact that PS5 fails to guarantee to rural land users that involuntary

[201] Ibid.
[202] Ibid at 36.
[203] Ibid.
[204] Ibid.

displacement will not take place thus leaves room for serious human rights violations to occur. The influence of the PS on the wider normative framework for TLA means that PS5 has also helped to make involuntary displacement an acceptable practice for non-IFC-financed TLA. PS5 also falls short of the Special Rapporteurs Minimum Principles, which require states to 'ensure that forced evictions do not take place'.[205]

Compliance with the PS is overseen by the Compliance Advisor/Ombudsman (CAO), which reports directly to the President of the World Bank. Complaints relating to any aspect of an IFC-financed business activity can be made to the CAO, which aims to 'resolve complaints using a flexible problem solving approach'.[206] In addition, the CAO overseas periodic audits of the IFC's overall environmental and social performance.[207] The most common response of the CAO to a complaint is to undertake a PS compliance audit of the project and then to advise its client on how to proceed.[208]

Since 2008, 21 complaints have been made to the CAO relating to land and other human rights violations occurring as a result of IFC-financed agricultural projects that involved TLA.[209] In all cases the communities claimed that they had 'not been adequately consulted, resettled and/or compensated for deals relating to their land.'[210]

In practice, the PS have failed to offer protection or recourse against involuntary displacement occurring as a result of TLA. For example, the IFC helped to finance a forest plantation project in Uganda proposed by UK-based New Forests Company (NFC). To make way for the company's planned logging operations, 20,000 people were forcibly evicted from their homes.[211] Oxfam International complained to the CAO that the project had violated the PS and an investigation was launched. The CAO concluded that 'NFC had been unable to comprehensively apply the principles guiding resettlement', but because the government carried out the eviction, and NFC made 'all possible efforts to engage and collaborate with the Government agency', the

[205] Special Rapporteur on the right to food, Olivier De Schutter op cit note 15 at 24.
[206] IFC op cit note 195 at 12.
[207] Ibid.
[208] CFS Open Ended Working Group on principles for responsible agricultural investments which enhance food security and nutrition 'Consultancy output 1: Summary of international initiatives that provide guidance on responsible investment: key characteristics' (29 Jan 2013) 17.
[209] Oxfam op cit note 196 at 9.
[210] Ibid.
[211] Oxfam op cit note 1 at 15.

CAO was satisfied that NFC had complied with PS5.[212] Oxfam has argued that, in these and other cases relating to TLA, 'the application of safeguards for affected communities has not been sufficiently stringent.'[213] In addition to not sanctioning the company involved or offering any redress to the displaced communities, the fact that the forced evictions were allowed to occur in the first place also revealed that the PS provided insufficient protection for communities at the planning and implementation stages of the project.

Overall, PS5 is a weak attempt by the IFC to alleviate the human rights impacts of the land acquisition projects it finances. The PS do not guarantee rights to communities which are well established in human rights law, particularly in relation to involuntary displacement. This in effect condones such outcomes and does not constitute a significant improvement on the existing legal frameworks regulating TLA.

(c) Principles for Responsible Investment in Agriculture that Respect Rights, Livelihoods and Resources (PRAI)

At the July 2009 L'Aquila Summit, G8 governments agreed to support efforts to strengthen global governance for food security, including the initiation of negotiations on the future governance of agricultural investment.[214] In 2010 an inter-agency working group was set up comprising the Food and Agriculture Organisation of the United Nations (FAO), the United Nations Conference on Trade and Development (UNCTAD), the International Fund for Agricultural Development (IFAD) and the World Bank. The group embarked on a two-year consultation process and in 2012 approved the Principles for Responsible Investment in Agriculture that Respect Rights, Livelihoods and Resources (PRAI). The PRAI are a set of seven principles applicable to all stakeholders involved in TLA, with the aim of promoting 'win-win' outcomes for all parties involved and affected in agricultural investment. They are as follows:[215]

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[212] Ibid at 35.
[213] Oxfam op cit 196 at 10.
[214] "L'Aquila" Joint Statement on Global Food Security, G8 Summit, Italy, 10 July 2009 at para 8. www.g8italia2009.it/static/G8_Allegato/LAquila_Joint_Statement_on_Global_Food_Security%5b1%5d%2c0.pdf.
[215] www.fao.org/fileadmin/templates/est/INTERNATIONALTRADE/FDIRAI_Principles_Synoptic.pdf

> Principle 1: Existing rights to land and associated natural resources are recognized and respected.
>
> Principle 2: Investments do not jeopardize food security but rather strengthen it.
>
> Principle 3: Processes relating to investment in agriculture are transparent, monitored, and ensure accountability by all stakeholders, within a proper business, legal, and regulatory environment.
>
> Principle 4: All those materially affected are consulted, and agreements from consultations are recorded and enforced.
>
> Principle 5: Investors ensure that projects respect the rule of law, reflect industry best practice, are viable economically, and result in durable shared value.
>
> Principle 6: Investments generate desirable social and distributional impacts and do not increase vulnerability.
>
> Principle 7: Environmental impacts of a project are quantified and measures taken to encourage sustainable resource use, while minimizing the risk/magnitude of negative impacts and mitigating them.

The Principles have contributed to the internationally accepted norms and standards governing TLA. They re-emphasise the standards for TLA set out by the Special Rapporteur on the right to food and cover the key sustainability criteria elaborated by the CSR and CCM initiatives explored in Chapter III.[216] The obvious limitation of PRAI is that they are non-binding principles and have no enforcement mechanism. Their brevity means that the PRAI also do not represent an attempt to create soft law principles that could be elevated to a binding treaty in the future. Moreover, the PRAI fail to acknowledge the binding nature of the obligations they do cover. Important principles in relation to land rights and food security are stated, but not sourced in international law, rather the agreement between international agencies from which they came. As the vast majority of states have ratified the ICESCR from which the rights to food and land arise, this constitutes a failure to tie the Principles to states

[216] Margulis et al op cit note 3 at 11.

existing human rights obligations. Doing so would have given PRAI more teeth and increased the opportunities for affected communities to formulate complaints and opposition to TLA grounded in binding international law. The PRAI do not therefore offer communities affected by TLA any new mechanism by which to oppose or seek redress for any negative impacts that may be linked to TLA.

The PRAI also contain nothing on access to information, which is vital for communities to frame adequate and timely responses to interest in their land. As with the IFC's PS5, Principle 4 requires investors to consult with communities affected by their investments, but their consent is not required. With no access to remedy provided for in the guidelines, and no means to enforce this even if it were included, it is hard to demonstrate what practical impact the PRAI will have on rural land users affected by TLA.

(d) Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT)

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT, or the Voluntary Guidelines)[217] are a set of global guidelines that promote secure tenure rights and equitable access to land, fisheries and forests, with an emphasis on vulnerable and marginalized peoples, in order to assist states in achieving 'food security and progressive realization of the right to adequate food, poverty eradication, sustainable livelihoods, social stability, housing security, rural development, environmental protection and sustainable social and economic development.'[218] The Voluntary Guidelines were officially endorsed by the Committee on World Food Security (part of the FAO) on 11 May 2012,[219] and their implementation has since been encouraged by the G20, Rio+ 20 and the United Nations General Assembly.

The VGGT outline principles and practices that governments can refer to, and be held accountable for, when making laws and administering land, fisheries and forests rights. Their four core aims are to:

[217] www.fao.org/docrep/016/i2801e/i2801e.pdf.
[218] FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012) 1.1.
[219] Committee on World Food Security, Report of the 38th (Special) Session of the Committee on World Food Security (May 11, 2012) UN Doc CL 144/9.

- Improve tenure governance by providing guidance on internationally accepted practices for systems that deal with the rights to use, manage and control land;
- Contribute to the improvement and development of the policy, legal and organizational frameworks regulating the range of tenure rights that exist for land;
- Enhance the transparency and improve the functioning of tenure systems;
- Strengthen the capacity of administrators and other stakeholders involved in or affected by land governance.[220]

The Guidelines address a much broader scope than PRAI, which have little to say on tenure security, access to land, or the broader governance of land tenure. Under the VGGT, states are required to recognize, respect, protect and promote tenure (and other) rights for all legitimate tenure rights holders.[221] States must also ensure that tenure right holders, whether their tenure is recorded or not, are protected against the arbitrary loss of their tenure rights, including forced evictions,[222] and provide effective, affordable and accessible judicial mechanisms to deal with infringements of legitimate tenure rights and to resolve disputes over tenure rights.[223] Though the Guidelines recognise the primary responsibility of the State in land governance, non-state actors including transnational businesses are reminded of their responsibilities to act with due diligence in their operations in order to avoid infringing on the human rights and legitimate tenure rights of local land users.[224] These responsibilities include 'appropriate risk management systems to prevent and address adverse impact on human rights … [and] to provide remedy, including effective operational-level grievance mechanisms, where appropriate, where they have caused or contributed to adverse impacts on human rights and legitimate tenure rights.'[225]

The Voluntary Guidelines acknowledge that investment in land, fisheries and forests is necessary for economic growth and development, but recommend that safeguards are adopted in order to protect the human rights of rural people affected by such investments. Specifically in relation to TLA, states are required to:

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[220] FAO op cit note 218 at 1.2.
[221] Ibid at 3.1.1–3.1.3.
[222] Ibid at 3.1.2.
[223] Ibid at 3.1.4.
[224] Ibid at 3.2.
[225] Ibid.

> provide safeguards to protect legitimate tenure rights, human rights, livelihoods, food security and the environment from risks that could arise from large-scale transactions in tenure rights. Such safeguards could include introducing ceilings on permissible land transactions and regulating how transfers exceeding a certain scale should be approved, such as by parliamentary approval. States should consider promoting a range of production and investment models that do not result in the large-scale transfer of tenure rights to investors, and should encourage partnerships with local tenure right holders.[226]

Part 3 of the VGGT emphasizes that investments affecting indigenous peoples must be carried out in accordance with the provisions of ILO Convention No. 169 and the Indigenous Peoples Declaration.

The VGGT are the first international instrument dedicated to land/tenure rights. Following on from the Minimum Principles proposed by the Special Rapporteur on the right to food, the Guidelines also provide an authoritative endorsement of the need to place human rights concerns at the heart of governance and legal frameworks regulating TLA. The VGGT fully take existing human rights law into account by providing that '[a]ll programmes, policies and technical assistance to improve governance of tenure through the implementation of these Guidelines should be consistent with States' existing obligations under international law, including the Universal Declaration of Human Rights and other international human rights instruments.'[227] Moreover, unlike the PRAI, the Voluntary Guidelines specifically include and stress the importance of women's human rights, by requiring states to 'ensure that women and girls have equal tenure rights and access to land … independent of their civil or marital status' and that these rights must receive special consideration in the process leading up to and implementation of investments in land.[228]

However, like the PRAI, the Guidelines are voluntary. A well supported test case at a domestic, regional or international level involving human rights violations alleged to have resulted from a TLA could certainly draw on the Guidelines as an

[226] Ibid at 12.6.
[227] FAO op cit note 218 at 1.1.
[228] Ibid at 3B.4.

authoritative statement of norms and standards accepted by the international community. However, it is unclear at this stage what weight would be given to them by the relevant judicial bodies, or the extent to which they will be incorporated into domestic and/or regional land governance frameworks. The Guidelines themselves are not enforceable and include no remedial or enforcement mechanisms.

Though the VGGT highlight the responsibilities of foreign investors to respect human rights, their applicability and implementation is clearly aimed at the State. With SRSG Ruggie's Guiding Principles on Business and Human Rights in mind, this constitutes a missed opportunity to further develop the international community's response to the human rights obligations of business in an area where the activities of transnational enterprises have a great deal of influence on human rights outcomes. The Guidelines also fail to promote free, prior and informed consent as an international norm in relation to TLA by requiring States and investors only to ensure the participation and consultation of local communities in negotiations over land.

V. CONCLUSION AND WAYS FORWARD

There is little doubt that foreign investors will continue to play a significant role in the development of low-income countries agricultural and other sectors. Yet the changes that foreign investment brings can be negative as well as positive, especially for people who are not empowered to protect and advance their rights. International trade and investment law place few requirements on investors to uphold human rights and attempts to integrate international human rights law into these frameworks have foundered repeatedly at the Doha Development Round of trade talks. At the international level the UN, global civil society, other non-state actors and some governments have begun developing new regulatory frameworks and soft law instruments designed to mitigate and alleviate the negative social and other impacts that TLA can bring. However, major improvements need to be made to the global governance and regulatory responses to TLA reviewed in this paper if they are to have a significant impact on the range of human rights violations that are occurring as a result of the global rush for land.

The enforcement mechanisms of the UN remain weak, although there will be more scope for legal challenges to be made in relation to land, food and housing rights

at the UN level once the Optional Protocol to the ICESCR enters into force. This will allow affected communities and their representatives to petition the UN for redress of violations of these rights. The CESCR could draw on the Minimum Principles and Guidelines promulgated by the Special Rapporteur on the right to food and this could set new and progressive precedents for domestic and regional courts. Once the African Court of Justice and Human Rights enters into operation it will be also be able to issue binding judgements relating to land, food and housing rights.

The Performance Standards of the IFC do not meet the minimum standards for human rights protection in relation to TLA endorsed by the Special Rapporteur on the right to food and the Human Rights Council and should therefore be revised. They must require the consent of communities whose land and food rights are put at risk from land acquisitions and require that no forced evictions take place in order to make way for IFC-financed investment projects. These two changes would have important repercussions as the Performance Standards have a significant influence on the normative standards accepted and used by the international investment community.

The Principles for Responsible Investment in Agriculture have contributed to the internationally accepted norms and standards governing TLA, but do not source those standards in international law and offer no new mechanism to which communities affected by TLA can appeal.

The Voluntary Guidelines have received wide international acceptance but states and non-state actors are under no obligation to adhere to them. Moreover, they fail to promote the free, prior and informed consent of affected communities as a requirement for undertaking a land acquisition. This denies communities the essential power of a veto to demand and claim their rights, and must be amended.

A recent Oxfam report on the challenge of 'responsible investment' concluded that '[t]he scale of the challenge we face in fully integrating poverty reduction and development issues into investment practice is immense … [and] will take many years and require huge levels of political and institutional support.'[229] With the above changes, the responses to TLA outlined here hold some potential to improve the human rights impact of TLA over the long-term. In the short-medium term the momentum created at the international level by the recently UN General Assembly

[229] HV Fiestas, R Sullivan & R Crossley 'Better returns in a better world: Responsible investment: overcoming the barriers and seeing the returns' (2010) Oxfam International 31.

endorsed Voluntary Guidelines could be built upon with the aim of creating a harder human rights instrument, such as a Declaration, that states could sign up to implementing. A binding human rights framework on responsible investment in land and agriculture could follow in the longer-term. Such a Declaration would remove the present legal uncertainty over the place of human rights in TLA. It could firmly establish community participation and consent, transparency and accountability in negotiations, accessible complaints and grievance procedures, and provision of effective redress as international legal norms in the context of transnational investment in land.

Investment in such a vital resource as land, upon which the livelihoods, sustenance and cultural life of so many people depend, should bring benefits for all stakeholders concerned. A human rights approach to investment in land provides a broad and substantive basis for evaluating the social, economic and environmental impacts of land acquisitions, and goes far beyond the cost-benefit risk analysis currently used in international trade and investment law. Damage to human rights must no longer be seen as a 'risk to be contained', but central to the decision to go ahead with a land deal, as well as to the processes through which any transfer of land rights takes place. A human rights based regulatory framework puts governments and companies under pressure to justify deals in terms of their impact on widely accepted human rights norms. Elevating the VGGT into a more enforceable human rights law document would be the best legal response the international community can make to the impact the global rush for land is having on the human rights of rural land users.

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